

1 DONALD SPECTER – 083925
STEVEN FAMA – 099641
2 MARGOT MENDELSON – 268583
PRISON LAW OFFICE
3 1917 Fifth Street
Berkeley, California 94710-1916
4 Telephone: (510) 280-2621

MICHAEL W. BIEN – 096891
JEFFREY L. BORNSTEIN – 099358
ERNEST GALVAN – 196065
THOMAS NOLAN – 169692
LISA ELLS – 243657
JENNY S. YELIN – 273601
MICHAEL S. NUNEZ – 280535
JESSICA WINTER – 294237
MARC J. SHINN-KRANTZ – 312968
CARA E. TRAPANI – 313411
ALEXANDER GOURSE – 321631
ROSEN BIEN
GALVAN & GRUNFELD LLP
101 Mission Street, Sixth Floor
San Francisco, California 94105-1738
Telephone: (415) 433-6830

9 Attorneys for Plaintiffs

11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF CALIFORNIA

14 RALPH COLEMAN, et al.,
15 Plaintiffs,
16 v.
17 GAVIN NEWSOM, et al.,
18 Defendants.

Case No. 2:90-CV-00520-KJM-DB

**PLAINTIFFS' RESPONSE TO
APRIL 6, 2020 ORDER [ECF NO. 6580]**

Judge: Hon. Kimberly J. Mueller

1 On April 6, 2020, the Court ordered the parties to file simultaneous briefing
2 addressing two questions:

- 3 1. In light of the coronavirus pandemic, what are the constitutional minima
4 required for physical safety for Coleman class members? Is six feet of
5 physical distancing required by the Constitution? If not, why not and what is
6 required?
- 7 2. Assuming some level of physical distancing is required by the Constitution,
8 what additional steps, if any, must be taken to ensure that defendants
9 continue to deliver to Coleman class members at a minimum the level of
10 mental health care that has thus far been achieved in the ongoing remedial
11 process in this case, focused on achieving the delivery of constitutionally
12 adequate mental health care to the plaintiff class?

13 Apr. 6, 2020 Order, ECF No. 6580 at 2. Plaintiffs address these questions below.

14 **I. The Constitutional Minima for Physical Safety of *Coleman* Class Members**

15 The Constitution requires that incarcerated persons be protected from substantial
16 and known risks of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994); *Parsons*
17 *v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014). As the Three-Judge Court recognized, “the
18 Eighth Amendment requires Defendants to take adequate steps to curb the spread of
19 disease within the prison system.” Apr. 4, 2020 Order, ECF No. 6574 at 8. “Thus far, the
20 only way to stop [COVID-19’s] spread is through preventative measures—principal
21 among them maintaining physical distancing sufficient to hinder airborne person-to-person
22 transmission.” *Id.* An official demonstrates disregard of a risk by “failing to take
23 reasonable measures to abate it.” *Farmer*, 511 U.S. at 847. Here, the list of reasonable
24 measures to prevent the spread of COVID-19 is well delineated and largely undisputed by
25 Defendants: physical distancing, washing hands, avoiding crowded places, and
26 disinfecting.

27 At a minimum, the Constitution requires that CDCR follow the dictates of clinical
28 and public health experts and promptly implement the measures needed to protect

1 *Coleman* class members from preventable suffering and death as a result of the COVID-19
2 pandemic. The Eighth Amendment prohibits prison officials from interfering with
3 necessary clinically required protections. *See Estelle v. Gamble*, 429 U.S. 97, 104–05
4 (1976). During this COVID-19 emergency, clinical and public health requirements must
5 be top priority. Failure to heed clinical and public health requirements will lead to
6 otherwise preventable suffering and death not only of *Coleman* class members, but of other
7 persons who live and work in CDCR prisons, and of persons in the surrounding
8 communities where CDCR clinical and custody staff live.

9 While “[c]reating physical distancing is uniquely difficult in a congregate
10 environment like a prison,” Apr. 4, 2020 Order, ECF No. 6574at 9, ““crowding generates
11 unsanitary conditions, overwhelms the infrastructure of existing prisons, and increases the
12 risk that infectious diseases will spread,”” *id.* at 14 (quoting *Coleman v. Schwarzenegger*,
13 922 F. Supp. 2d 882, 931 (E.D. Cal./N.D. Cal. 2009)). Because CDCR continues to house
14 the *Coleman* class in extremely crowded and unsanitary conditions, CDCR officials faced
15 additional impediments and were required to move even more swiftly to follow the dictates
16 of the public health experts and implement measures necessary to allow minimally
17 adequate preventative measures. The Constitution requires more effort, not less, when
18 there is a greater risk of harm caused by the very crowded conditions that Defendants have
19 allowed to persist.

20 The Court also asked: “Is six feet of physical distancing required by the
21 Constitution? If not, why not, and what is required?” The first answer is a qualified “yes.”
22 The second answer is contained in the qualifications to the “yes.” CDCR must provide
23 clinical and public health officials with the authority, resources, and space to implement
24 the levels of physical distancing called for by the particular circumstances, and for
25 particular vulnerable populations. For some incarcerated people in some circumstances,
26 the distance may be six feet, as public health officials recommend for the general
27 population moving about in the free world. For other people in other circumstances, the
28 necessary distance may be more or less than six feet, and may include a solid barrier or

1 even negative air pressure. For purposes of virus transmission, “distance” includes other
2 factors, such as the number of surfaces and objects that people must share with others, and
3 how often such objects can be cleaned and/or sanitized. The Constitution requires that
4 clinical and public health officials be provided with the ability to bring about the necessary
5 safety and “distancing” for each population. What the Constitution *prohibits* are acts or
6 omissions by CDCR that prevent clinical and public health officials from applying the
7 right distancing approach to the right population. Such acts or omissions include leaving
8 particular prisons or housing units so overcrowded that officials cannot implement the
9 necessary distancing, or refusing to swiftly act to implement sufficient releases or transfers
10 necessary to achieve the necessary distancing.

11 Courts all over the country have recognized that physical distancing is necessary to
12 protect the lives and health of incarcerated persons, and have issued release orders
13 grounded in part on findings that facilities cannot ensure physical distancing.¹

14 The *Coleman* class contains several distinct populations in terms of COVID-19 risk,
15 and in terms of housing. The *Coleman* class contains many people over age 65, and
16 approximately half the class has co-morbidities that put them at particular risk for adverse
17 COVID-19 outcomes.² As time passes, many *Coleman* class members will transition from
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19 ¹ See, e.g., *Castillo v. Barr*, CV2000605TJHAFMX, 2020 WL 1502864, at *5 (C.D. Cal.
20 Mar. 27, 2020) (granting TRO for release of detainees at Adelanto, California detention
21 center in part because conditions of confinement took away ability to socially distance);
22 *Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020)(granting
23 TRO for release of immigration pre-trial detainees in part because “[r]espondents could not
24 represent that the detention facilities were in a position to allow inmates to remain six feet
25 apart from one another, as recommended by the Centers for Disease Control and
26 Prevention”); *United States v. Davis*, No. 1:20-cr-9-ELH, Dkt. No. 21 (D. Md. Mar. 30,
27 2020) (releasing defendant because “[s]ocial distancing in a pretrial facility is nearly
28 impossible for anyone who enters its doors, especially detainees”); *United States v. Colvin*,
No. 3:19cr179 (JBA), 2020 WL 1613943 (D. Conn. Apr. 2, 2020) (noting defendant’s
multiple health conditions, including diabetes, and “inability to practice effective social
distancing and hygiene to minimize her risk of exposure” as reasons justifying her
immediate release).

² According to March 30, 2020 data provided by the *Plata* Receiver, over 1,600 *Coleman*
class members were over 65 and approximately 50% of the class had at least one risk
factor for adverse COVID-19 Outcomes. Decl. of Don Specter In Supp. Of Pls.’

1 the at-risk groups to being actual COVID-19 patients, subject to isolation or quarantine.
2 Indeed, more than half of the 19 incarcerated people who have tested positive to date are
3 *Coleman* class members.³ In addition, the *Coleman* class is housed in various ways, with a
4 significant number of patients housed in dorms, and most of them in dorms crowded at or
5 beyond their design capacity.⁴ CDCR’s crowded and double-bunked dorms, especially
6 when they are housing medically vulnerable *Coleman* class members, fail by any measure
7 to allow for even the hypothetical possibility of providing the recommended physical
8 distancing, cleanliness, and other standards necessary to stop the spread of COVID-19.

9 The Constitution requires immediate action to achieve the following as to both the
10 *Coleman* class and all other incarcerated persons. The following mitigation measures are
11 taken from the concurrently filed declaration of Dr. Marc Stern. These mitigation
12 measures or their equivalents are required given the present state of knowledge about
13 COVID-19; more steps might be required in the future as we learn more about
14 transmission:

- 15 1. Identification of those people who are at the highest risk for severe
16 complications from the virus. Stern Decl. ¶ 13.
- 17 2. Immediate steps to ensure that such high-risk individuals are safely situated,
18 either by releasing them, or ensuring that they are safely housed where they
19 can best practice physical distancing. *Id.*
- 20 3. Immediate steps to downsize the population to the lowest number possible at
21 each prison by release or transfer to a safe alternative. Priority should be

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24 Emergency Mot., ECF No. 6559, Exh. B at 17 (listing 1,267 CCCMS individuals, 309
25 EOP individuals, and 27 individuals at higher levels of care, for a total of 1,603 *Coleman*
26 class members aged 65 or over); *see also id.* (listing 13,492 CCCMS individuals, 3,565
27 EOP individuals and 724 individuals at higher levels of care, for a total of 17,718 of the
28 35,920 person class (49.5%), as “patients with at least 1 risk factor” for COVID-19).

³ As of the time of this writing, 11 *Coleman* class members have tested positive: eight
Enhanced Outpatient Program (“EOP”) patients at CSP-Lancaster (LAC) and three
Correctional Clinical Case Management System (“CCCMS”) patients at California
Institution for Men (CIM). Bien Decl. ¶ 2.

⁴ Decl. Of Michael W. Bien In Supp. Of Pls.’ Emergency Mot, ECF No. 6529,. ¶¶ 18-19

1 given to releasing high-risk individuals and those in crowded dormitories.
2 This process will create space to deal with the need for isolation and
3 quarantine, and allow greater opportunities for physical distancing to slow
4 the spread of the virus. *Id.* ¶ 14.

- 5 4. Immediate planning to address foreseeable changes in conditions, including a
6 reduction in workforce (custody and healthcare staff) as workers respond to
7 their personal needs (self-quarantine or isolation, care for ill relatives,
8 staying at home with school-age children). Such planning may require
9 further population downsizing. *Id.* ¶ 16.

10 **II. Additional Steps Necessary for Delivery of Mental Health Care**

11 The *Coleman* class was *not* receiving mental health care at the minimally adequate
12 level required by the Constitution before COVID-19. *See, e.g.*, Apr. 4, 2020 Order, ECF
13 No. 6574 at 15 (“It is undisputed that the delivery of [mental health] care, to date, remains
14 below constitutional minima.”) (Mueller, J. concurring). And CDCR’s woeful response to
15 the pandemic, beginning in March 2020, has made conditions far worse for the *Coleman*
16 class. The population reduction measures instituted by Defendants to date have not been
17 targeted to the medically vulnerable and were too late and too small to significantly reduce
18 the crowded dorms. *See* Decl. of Michael W. Bien filed herewith (“Bien Decl”), ¶ 22 &
19 Exh. 20.

20 Defendants permitted the Department of State Hospitals on March 16, 2020 to deny
21 admittance to inpatient psychiatric hospitalization to *Coleman* class members in need of
22 ICF hospitalization without any plan in place to substitute additional psychiatric hospital
23 resources. *See* Special Master’s Amended Report on the Current Status of the *Coleman*
24 Class Members’ Access to Inpatient Care in the Department of State Hospitals (“Amended
25 2020 DSH Access Report”), ECF No. 6579, at 8 (Apr. 6, 2020). To date, Defendants have
26 refused to reopen DSH to *Coleman* class members under any conditions. *See* Apr. 3, 2020
27 Order, ECF No. 6572 at 2; Amended 2020 DSH Access Report at 10, 31.

28 Defendants’ primary response to COVID-19 has been to reduce and restrict group

1 treatment and transfers to higher levels of mental health care within CDCR prisons, even
2 though they lack any concomitant plan to provide enhanced treatment to class members
3 needing inpatient treatment who are stuck in EOP and general population units instead. If
4 Defendants' current plan⁵ moves forward, patients in need of inpatient psychiatric
5 hospitalization will no longer transfer to an outside Mental Health Crisis Bed ("MHCB")
6 or Psychiatric Inpatient Unit ("PIP") unless they make it through a many-leveled veto
7 process required before any such transfer can occur—even from institutions without a
8 crisis bed unit or PIP. Bien Decl. ¶ 8 & Exh. 7. The best case scenario for those acutely ill
9 patients who by definition cannot function at lower levels of care will instead be to receive
10 treatment in temporary mental health units that do not currently exist, where clinical staff
11 of undefined levels are expected to follow treatment guidelines Defendants have not even
12 begun to develop. *See id.*

13 While mental health treatment in the PIPs is not currently at constitutional levels,
14 *see* Amended 2020 DSH Access Report at 29, restrictions on access to the PIPs for patients
15 in need of psychiatric hospitalization makes a bad situation even worse. Defendants
16 recognize that "[m]ental health patients are at increased risk for escalation in depression,
17 anxiety, panic attacks, psychomotor agitation, psychotic symptoms, delirium, and
18 suicidality during this COVID-19 pandemic." Defs.' Plan Addressing COVID-19
19 Pandemic, ECF No. 6535 at 5 (Mar. 27, 2020). As the virus progresses, the demand for
20 mental health treatment from both class members and people outside the class will
21 *increase* at the same time that staffing levels *decrease* due to staff illness and other factors.

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24 ⁵ It is unclear how Defendants' current plan interacts with their prior COVID triage plan,
25 which provided for a tiered approach to mental health programming and services
26 depending on how severely staffing levels at a given institution or program are affected by
27 COVID. *See generally* Defs.' Plan Addressing COVID-19 Pandemic, ECF No. 6535
28 (Mar. 27, 2020). But that policy too provided for elimination of essentially all groups and
other out of cell treatment and programming by the third tier, and severe if not total
prohibitions on transfers to higher levels of care. *Id.* at 15-17.

1 This will surely exacerbate Defendants’ ongoing suicide crisis.⁶

2 Almost three-quarters of the record high number of suicides in 2019 were of
3 *Coleman* class members and a quarter of the people who died by suicide had been treated
4 in an inpatient bed in the months before their deaths and then discharged just prior to their
5 suicides, and another quarter likely needed some form of inpatient care but were never
6 transferred to an inpatient setting to receive it before they killed themselves. Amended
7 2020 DSH Access Report at 29-30.

8 Defendants’ most extreme response has been at its most dangerous prison,
9 California State Prison, Sacramento (“SAC”), which houses 1,309 class members
10 including 751 EOPs, 172 of whom are in the Psychiatric Services Unit (“PSU”) and
11 another 64 in the EOP Administrative Segregation Unit (“ASU”), and where any and all
12 external transfers to MCHB, Intermediate Care Facility (“ICF”), and Acute Psychiatric
13 Program (“Acute”) levels of care have been suspended since March 25, 2020. *See* Bien
14 Decl. ¶¶ 25-26 & Exhs. 21-22; *see also* Amended 2020 DSH Access Report at 51. As of
15 March 28, 2020, the entire SAC institution stopped running mental health groups, and
16 individual clinical contacts were reportedly occurring once per week at patients’ cell-front.
17 Bien Decl. ¶ 27 & Exh. 23. Although SAC continues to admit patients to its MHCB
18 internally, the capacity is only 33 beds, many of which are unlicensed. *Id.*

19 As of March 31, 2020, 18 SAC patients had pending PIP referrals, seven of which
20 are past timeframes. Bien Decl. ¶ 28 & Exh. 24. Due to bed shortages, some of those
21 acutely ill people are suffering in SAC’s extremely dangerous segregation units. Bien
22 Decl. ¶ 27 & Exh. 23. Nine suicides occurred at SAC in 2019 and eight of the nine were at
23 the EOP level of care; six of the nine suicides were in EOP segregation units. Bien Decl. ¶
24 24. Four of the nine suicides involved discharges from psychiatric hospitalization in a
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27 ⁶ In 2019, CDCR had an astronomical suicide rate of 30.3 suicides per 100,000 prisoners,
28 an increase of 15% over the 2018 rate, and the highest rate on record in this case. *See*
Corrected Decl. of Cara E. Trapani In Supp. Of Pls.’ Proposed Agenda Items for First
Quarterly Status Conf., ECF No. 6495, ¶¶ 2-3 (Mar. 3, 2020).

1 crisis bed or PIP within a few weeks and as little as five hours before the death. *Id.*

2 Finally, despite the well-known harms of segregation on people with serious mental
3 illness, *see, e.g., Coleman v. Brown*, 28 F. Supp. 3d 1068, 1095 (E.D. Cal. 2014), Decl. of
4 Craig Haney in Supp. of Pls.’ Emergency Mot. (“Haney Decl.”), ECF No. 6526, ¶ 16,
5 Defendants’ response to the pandemic has resulted in increased use of solitary confinement
6 -like conditions, and decreased mental health treatment and access to yard, family visiting
7 and other activities. *See* Defs.’ Plan Addressing COVID-19 Pandemic, ECF No. 6535 at 4
8 (Mar. 27, 2020). Indeed, it is Plaintiffs’ understanding that most group therapy has ceased
9 system wide, and that most, if not all, clinical contacts are now occurring cell-front in high
10 security units, to the extent they are occurring at all. Bien Decl. ¶ 8.

11 On April 7, CDCR imposed a COVID-19 Mandatory 14-Day Modified Program,
12 restricting even more programming, treatment and activities at all prisons. Bien Decl. ¶ 18
13 & Exh 17. Defendants’ COVID-19 strategy, including the lockdown, will certainly
14 increase the demand for mental health services from the whole population and exacerbate
15 existing psychiatric symptoms and referrals for higher levels of care, including inpatient
16 psychiatric hospitalization for the *Coleman* class. *See* Haney Decl. ¶¶ 11-16.

17 Staffing shortages plagued the delivery of mental health services before the
18 pandemic and are only getting more dire. *Cf.* Oct. 8, 2019 Order, ECF No. 6312, at 6-7.
19 Numerous CDCR staff, including psychiatrists, psychologists, social workers, and
20 rehabilitation therapists, have fallen ill or “called out” due to the pandemic, exacerbating
21 preexisting clinical staffing shortages, especially in the already “severely strained” PIPs.
22 *See, e.g.,* Amended 2020 DSH Access Report at 22-30, 34. Defendants’ tiered plan for
23 triaging mental health services and programming reflects Defendants’ reasonable
24 anticipation that clinical and custody staffing will plummet further.

25 In response to the Court’s second question, given these current realities, it is simply
26 not possible for Defendants to provide even the inadequate level of mental health care that
27 existed in February 2020 under these conditions. While there are steps that may be taken
28 to mitigate the harm to the *Coleman* class, it is inevitable that the pandemic will result in a

1 denial of minimally adequate mental health care and cause unnecessary and avoidable
2 pain, suffering and even death unless the population is swiftly reduced. The following
3 measures, if rapidly implemented, will tend to lessen the harm.

4 **1. Transfer Medically Vulnerable to Locations Where Necessary**
5 **Mental Health Care Is Possible.**

6 First, Defendants should be ordered to transfer medically vulnerable *Coleman* class
7 members from their current dangerous prisons to locations where they can be both safely
8 housed and received necessary mental health care. As the Three-Judge Court observed,
9 the *Plata* court’s 2013 Valley Fever Order offers a roadmap for just such action. *See* Apr.
10 4, 2020 Order, ECF No. 6574 at 9-10.⁷ Because these transfers do not involve the same
11 public safety decision-making required for a full release from custody to parole, they can
12 be made without most of the delay of pre-release planning and securing of housing and
13 reentry transportation and services.

14 As part of this process, the Court should order Defendants to identify additional
15 resources for inpatient psychiatric hospitalization and promptly transfer patients to those
16 beds. Not only should DSH be required to rescind its suspension of admissions and
17 discharges from its existing programs for *Coleman* patients but it should be required to
18 identify and make available additional beds throughout its five hospitals. In addition,
19 Defendants should be required to identify and secure additional inpatient psychiatric
20 hospital capacity in California and transfer *Coleman* patients in need of hospitalization to
21 those beds.

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24 ⁷ Defendants also have ample authority to authorize such releases on their own. California
25 Government Code 8658 allows Defendants to make temporary emergency transfers to
26 safety of medically vulnerable class members to locations where the risk of contracting
27 Covid-19 is substantially reduced. The Governor also has power to grant a reprieve from
28 sentence under Article V, Section 8(a) of the California Constitution. Finally, sections
62010.3.1 and 62010.3.2 of CDCR’s Department Operations Manual (“DOM”) authorizes
Headquarters staff, Wardens, Chief Deputy Wardens to “sign orders for removal of
inmates in time of specified disasters and/or temporary community release.” *See*
[https://www.cdcr.ca.gov/regulations/wp-
content/uploads/sites/171/2019/07/Ch_6_2019_DOM.pdf](https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2019/07/Ch_6_2019_DOM.pdf) (last visited Apr. 8, 2020).

1 **2. Transfers for Enhanced Outpatient Program Level of Care**

2 Second, Defendants should be ordered to remedy the current serious deficiencies in
3 the provision of mental health care to patients in the EOP level of care by identifying
4 additional resources for this level of care and promptly transferring appropriate patients to
5 those locations. Defendants should be required to identify and secure additional resources
6 that could rapidly be made available for *Coleman* patients, including identifying what
7 additional staffing, security or other resources would be necessary and the date when
8 patients could begin to be transferred.

9 **3. Modifications to Policy and Practice**

10 Third, Defendants should be ordered to modify their existing policy and practice in
11 the following ways: (1) expand telemedicine to psychologists and social workers by using
12 tablets or phones, consistent with Governor Newsom’s directive loosening all restrictions
13 of the provision of telehealth to expand treatment in the face of the COVID-19 crisis, *see*
14 *Bien Decl.* ¶ 6 & Exh. 5; (2) modify transfers to higher level of care policy to permit
15 appropriate access; (3) expand phone and mail and email privileges by adding the use of
16 cell phones or tablets; (4) provide entertainment devices to all persons in segregation units,
17 quarantine units and isolation units, PSU and PIPs to mitigate the dangers of isolation; (5)
18 provide a 90-day supply of medications upon discharge and increase “gate money” to
19 \$1000 from \$200 in light of pandemic conditions in the free world. *See Bien Decl.* ¶ 29.

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21 DATED: April 8, 2020

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: /s/ Michael W. Bien

Michael W. Bien

Attorneys for Plaintiffs