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11 IN THE UNITED STATES DISTRICT COURT  
 12 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 13 SACRAMENTO DIVISION

15 **RALPH COLEMAN, et al.,**  
 16  
 Plaintiffs,  
 17  
 v.  
 18  
 19 **GAVIN NEWSOM, et al.,**  
 20  
 Defendants.

2:90-cv-00520 KJM-DB (PC)

**DEFENDANTS’ MOTION FOR  
 RECONSIDERATION, REQUEST TO  
 VACATE THE APRIL 21, 2020  
 EVIDENTIARY HEARING, AND  
 ALTERNATIVE REQUEST FOR  
 CLARIFICATION OF APRIL 10, 2020  
 ORDER (ECF NO. 6600)**

**INTRODUCTION**

23 Defendants request the Court to reconsider its April 10, 2020 order setting an evidentiary  
 24 hearing regarding the Department of State Hospitals’ (DSH) admissions and discharge policy.  
 25 State officials are working around the clock to combat a global pandemic that has no foreseeable  
 26 horizon. In this time of worldwide crisis, any evidentiary hearing will significantly impair and  
 27 divert resources from DSH’s ability to manage the ongoing COVID-19 crisis and the  
 28 consequence will be less time and energy to devote to staff and patient care and safety.

1 Furthermore, the evidentiary hearing is no longer necessary, as its apparent focus, DSH's  
2 suspension of intake for *Coleman* class members, is no longer in effect.

3 If the Court wants to nonetheless hold an evidentiary hearing, Defendants request  
4 clarification so that they have adequate due process and understand the hearing's purpose and  
5 scope. The Court's April 10, 2020 order setting the evidentiary hearing provides little direction  
6 as to what specific factual issues will be the subject of the hearing or that call for witness  
7 testimony, which party holds the burden of proof, and whether any other witnesses, apart from  
8 those listed in the order, may be called and questioned. Defendants also request clarification  
9 concerning the witness examination process, such as whether the Court intends to examine  
10 witnesses, as it did during the Dr. Golding proceedings, with counsel asking follow-up questions.  
11 Given the pending worldwide COVID-19 crisis, which has no horizon, Defendants do not want to  
12 engage in unnecessary litigation. But if the Court intends to hold a trial, Defendants have well-  
13 established due-process rights, including the necessity of sufficient notice to adequately prepare  
14 for the trial so they can make a full record showing that they have appropriately exercised their  
15 executive authority to, like here, make rational and informed decisions to keep patients with  
16 serious mental illness safe in unexpected and unpredictable situations.

### 17 **BACKGROUND**

18 The world, like DSH and the California Department of Corrections and Rehabilitation  
19 (CDCR), continues to be in extreme crisis management to prevent and limit the spread of  
20 COVID-19. The Court directed its Special Master and team of experts to hold task-force  
21 meetings to monitor Defendants' collective COVID-19 response, which have been robust and  
22 productive (as the Special Master reported in his most recent report (ECF No. 6579) and at the  
23 April 10, 2020 status conference (ECF No. 6602)), including with respect to DSH's response to  
24 the worldwide pandemic and ongoing crisis.

25 Although the Court established the task force to avoid litigation, presumably so that State  
26 officials could focus on protecting inmate-patients and staff in an ever-evolving pandemic  
27 requiring real-time decision-making, the Court issued an order to show cause for DSH to "show  
28 why [the] court should not order defendants promptly to admit *Coleman* class members to

1 *Coleman*-designated inpatient beds in DSH consistent with the protocols established for  
2 admission of OMHDs to DSH facilities.” (ECF No. 6572 at 2.) DSH presented uncontroverted  
3 evidence showing why the Court should discharge the order to show cause, including productive  
4 ongoing discussions between DSH, CDCR, and the Special Master’s experts regarding a protocol  
5 for resuming the transfer of *Coleman* class members to DSH in a safe and controlled manner  
6 during the COVID-19 global emergency, the real dangers DSH faced (and continues to face)  
7 when it initially suspended transfers, and the deference DSH was due during an emergency of this  
8 magnitude. As Defendants briefly explained during the April 10, 2020 status conference, DSH is  
9 working in real time to address this still-evolving pandemic. New facts and circumstances exist  
10 to obviate the need for an evidentiary hearing.

11 DSH is authorized to make executive decisions in crisis and emergency circumstances to  
12 protect its patients and staff. Exercising appropriate authority, the State’s Executive Branch has  
13 made, and continues to make, informed decisions to address COVID-19. (See ECF No. 6591 at  
14 10-11.) DSH’s admissions and discharge policy at issue here expired on April 15, 2020, and,  
15 consistent with its authority, DSH will not be renewing the suspension of admissions of *Coleman*  
16 patients. (Hendon Decl., ¶ 9; Ex. A.) Instead, DSH is implementing a protocol to resume limited  
17 transfers of appropriately screened inmates to DSH, including *Coleman* patients, during the  
18 pandemic. (Hendon Decl., ¶ 10; Ex. B.) Given that *Coleman* patients will now be admitted to  
19 DSH hospitals as clinically indicated, there is no longer any need for an evidentiary hearing.  
20 Defendants are working daily to enact progressive, robust, and proactive measures to prevent and  
21 manage the spread of COVID-19 (all of which are available to this Court and the public<sup>1</sup>)  
22 throughout CDCR, including to DSH facilities, which to date have no patients testing positive for  
23 the disease. (Hendon Decl., ¶ 15.) Recently, Defendants in the *Plata v. Newsom* case filed  
24 extensive evidence showing the pre-emptive and on-going pro-active collaborative steps taken by  
25 the Governor, CDCR, and the *Plata* Receiver to meet this crisis.<sup>2</sup> For all of these reasons, the  
26 Court’s proposed evidentiary hearing is premature, if not moot.

27 <sup>1</sup> See website <https://www.cdcr.ca.gov/covid19/> (last accessed April 15, 2020.)

28 <sup>2</sup> See ECF Nos. 3272, 3274, 3275, 3277, 3278, and 3283 in *Plata v. Newsom*, No. 01-cv-1351-JST (N.D. Cal.).

**DISCUSSION**

**I. THE COURT SHOULD RECONSIDER ITS ORDER AND VACATE THE EVIDENTIARY HEARING SO DEFENDANTS CAN CONTINUE TO FOCUS ON PROTECTING PATIENTS FROM COVID-19.**

A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment. *Smith v. Massachusetts*, 543 U.S. 462, 475 (2005).

Reconsideration of an order is appropriate if the district court is presented with newly discovered evidence or committed clear error, or if there is an intervening change in the controlling law.

*Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

Here, the Court appears to have set this matter for an evidentiary hearing to determine the propriety and constitutional effect of DSH’s suspension of new admissions to its hospitals, although the specific topics or scope of the hearing are not clear. (*See* ECF No. 6600 at 3.) Reconsideration of the April 10, 2020 order is appropriate because the circumstances have changed since the Court set the evidentiary hearing. Specifically, DSH’s suspension of admissions of *Coleman* patients will lapse on April 16, 2020 and be replaced with a protocol to ensure the safe transfer of inmates most in need of its beds.<sup>3</sup> (Hendon Decl., ¶ XX.) DSH’s new policy will allow for the admission of *Coleman* patients to DSH hospitals based on individual needs and subject to certain protocols designed to minimize the risk of COVID-19 transmission. (Hendon Decl., ¶¶ 10, 13; Ex. B.) As such, no evidentiary hearing is necessary because *Coleman* patients are being offered controlled access to DSH inpatient services.

An evidentiary hearing at this time would also undermine State actors’ ability to make informed, reasonable, responsive, and critical decisions in moments of crisis like the pandemic still challenging world leaders right now. Defendants’ response to the order to show cause addressed the deference due the executive branch, including prison and state hospital officials, entrusted with the care of mentally ill inmates. As the United States Court of Appeal for the Fifth Circuit recently noted, state authorities are entitled to great deference concerning responses to a public health crisis. *In re: Abbott*, Case No. 20-50264, Document No. 00515374865 (5th Cir.,

<sup>3</sup> DSH will continue its temporary suspension of other classes of patients as part of its COVID-19 mitigation efforts. (Declaration of C. Hendon, ¶ 14.)

1 Apr. 7, 2020). “[W]hen faced with a society-threatening epidemic, a state may implement  
2 emergency measures that curtail constitutional rights so long as the measures have at least some  
3 ‘real or substantial relation’ to the public health crisis and are not ‘beyond all question, a plain,  
4 palpable invasion of rights secured by the fundamental law.’” *Id.* at 13 (citing *Jacobson v.*  
5 *Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905)). “Courts may ask whether the state’s  
6 emergency measures lack basic exceptions for ‘extreme cases,’ and whether the measures are  
7 pretextual—that is, arbitrary or oppressive. *Id.* (citing *Jacobson* at 38). At the same time,  
8 however, courts may not second-guess the wisdom or efficacy of the measures. *Id.* (citing  
9 *Jacobson*, 197 U.S. at 28, 30). Further, “[i]t is no part of the function of a court” to decide which  
10 measures are “likely to be the most effective for the protection of the public against disease.” *Id.*  
11 (citing *Jacobson*, 197 U.S. at 30). A court’s “fail[ure] to apply (or even acknowledge) the  
12 framework governing emergency exercises of state authority during a public health crisis,  
13 established over 100 years ago in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11  
14 (1905)” is “extraordinary error.” *Id.* at 10; *see also id.* at 13 (“*Jacobson* remains good law”).

15 Similarly, on the same date as this Court’s most recent status conference, an Illinois district  
16 court emphasized the deference due state officials in the prison context when responding to this  
17 pandemic. *Money v. Pritzker*, --- F. Supp. 3d ---, 2020 WL 1820660, at \*1 (N.D. Ill. Apr. 10,  
18 2020). Actions that require courts to get involved in prison management raise “serious concerns  
19 under core principles of federalism and the separation of powers.” *Id.* at \*15. Federalism  
20 counsels against courts getting involved in state prison management, while the separation of  
21 powers commits the task of running prisons to the “executive and legislative branches.” *Id.* at  
22 \*16. The concerns about “institutional competence [are] especially great where, as here, there is  
23 an ongoing, fast-moving public health emergency.” *Id.*

24 DSH took temporary and appropriate action to prevent the introduction and spread of  
25 COVID-19 within its facilities to protect their staff and patients, which includes *Coleman* class  
26 members. (See ECF No. 6590.) Now, responding to fast-evolving circumstances, DSH has  
27 implemented a policy allowing for essential transfers of *Coleman* class members in a safe and  
28 controlled manner. The Court should afford those decisions significant deference, particularly

1 given that DSH continues to work with the Special Master to see if it can reach agreement on the  
2 specifics of that policy for transferring patients as safely as possible based on evolving public  
3 health recommendations and as new evidence emerges. Good cause exists for this Court to  
4 reconsider its April 10 order, and the April 21 evidentiary hearing should be vacated.

5 **II. DEFENDANTS REQUEST THAT THE COURT CLARIFY THE NATURE OF ANY**  
6 **EVIDENTIARY HEARING.**

7 If the Court elects to proceed with the April 21 evidentiary hearing, Defendants need clarity  
8 to adequately prepare for trial and make a full and complete record. The Court’s April 10 order  
9 stated only that it intends to hold a focused evidentiary hearing “on the issue of Coleman class  
10 members’ access to DSH hospitals,” with “testimony from Drs. Warburton and Bick and an  
11 expert to be designated by plaintiffs[.]” (ECF 6600 at 4.) This vague description provides  
12 insufficient information for Defendants to adequately prepare for an evidentiary hearing set on  
13 just 11 days’ notice—with the Court giving Plaintiffs expedited discovery and demanding that  
14 Defendants meet other obligations on shortened time apart from the trial. (*Id.* at 3.)

15 Defendants are entitled to due process. At a minimum, they must be informed of the  
16 purpose of the hearing, which party bears the burden of proof, and whether the parties will be  
17 conducting the examinations or allowed to cross-examine or call additional witnesses. Are  
18 Defendants allowed to submit trial briefs and motions in limine? Will the Court allow opening  
19 and closing statements? Will the Court, as it did during the Dr. Golding evidentiary proceeding,  
20 ask questions first, and in which order will the parties be allowed to examine the witnesses? Will  
21 the Court again give Plaintiffs the opportunity to conduct direct and re-direct witness  
22 examinations? Can the parties submit proposed factual findings and legal conclusions?  
23 Moreover, depending on the issues set for this “focused” hearing, Defendants note that the  
24 witnesses the Court identified—Dr. Bick, Dr. Warburton, and Plaintiffs’ expert Dr. Stern—may  
25 not be best positioned to provide relevant testimony. Will Defendants have an opportunity to  
26 designate rebuttal witnesses, including expert witnesses? The Court’s order setting this  
27 evidentiary hearing raises many unanswered questions. In the event that the Court is considering  
28

1 the April 21, 2020 evidentiary hearing to be part of a larger contempt proceeding centered around  
2 its April 10, 2020 order to show cause, Defendants are entitled to additional procedural  
3 protections that are not present here.<sup>4</sup> Defendants are entitled to a fair hearing with notice as to  
4 the expectations placed upon them. Defendants therefore seek clarification of the nature of this  
5 evidentiary hearing well in advance of the April 21 hearing. Once the Court has set forth clear  
6 parameters for the hearing, Defendants request that they be permitted to submit a list of proposed  
7 witnesses to respond to the Court's questions.

### 8 CONCLUSION

9 In light of DSH's newly adopted admission protocols and the deference accorded to the  
10 executive branch in times of severe crisis, the Court should reconsider its April 10 order and  
11 vacate the April 21 evidentiary hearing so Defendants can focus on their work of preventing and  
12 managing the spread of COVID-19. But if the Court wants to proceed with the evidentiary  
13 hearing, Defendants are entitled to due process, and they ask that the Court clarify its April 10  
14 order and identify the hearing's scope and procedures so Defendants can make a clear record.

15 Dated: April 15, 2020

Respectfully submitted,

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17 Attorney General of California  
18 ADRIANO HRVATIN  
19 Supervising Deputy Attorney General

/s/ Lucas Hennes

20 LUCAS L. HENNES  
21 Deputy Attorney General  
22 Attorneys for Defendants

23 CF1997CS0003  
24 FINAL DRAFT motion for reconsideration of 4.10.20 order

25 <sup>4</sup> In the Ninth Circuit, a contemnor must be afforded “‘reasonable notice of the specific  
26 charges and an opportunity to be heard,’ and such notice of the contempt charge “‘must be explicit  
27 in order to conform to the requirements of due process.” *Little v. Kern Cty. Superior Ct.*, 294  
28 F.3d 1075, 1080-81 (9th Cir. 2002) (citations omitted). To show civil or criminal contempt, a  
court must determine that: 1) a court order was in effect, 2) the order required specific conduct  
by respondent, and 3) the respondent failed to comply with the court's order. *United States v.*  
*City of Jackson, Miss.*, 359 F.3d 727, 731 (5th Cir. 2004). The party moving to hold a party in  
civil contempt must prove each element by clear and convincing proof, rather than a  
preponderance of evidence. Alternatively, criminal contempt requires proof beyond a reasonable  
doubt and a jury trial for serious criminal contempt. *Int'l Union, United Mine Workers of Am. v.*  
*Bagwell*, 512 U.S. 821, 827 (1994).



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2:90-cv-00520 KJM-DB (PC)  
**DECLARATION OF C. HENDON IN  
 SUPPORT OF DEFENDANTS' MOTION  
 FOR RECONSIDERATION**

22 I, C. Hendon, declare:

23 1. I am currently employed by the California Department of State Hospitals (DSH) as  
 24 the Deputy Director for Hospital Strategic Planning and Implementation. I have held this position  
 25 since December 2018. I submit this declaration to support Defendants' Motion for  
 26 Reconsideration and Clarification of the Court's April 10, 2020 order. I have personal knowledge  
 27 of the statements in this declaration and could testify to them if called to do so.



1           2.     Before being named Deputy Director, I served in a number of other positions at DSH,  
2 including as the Enterprise Application Operations Director, Chief of Office of Information and  
3 Logistics, Director of the Project Management Office, and a project manager.

4           3.     I received a Bachelor of Arts in psychology from the University of California, Davis,  
5 and a Masters of Arts in Counseling Psychology from California State University, Sacramento.

6           4.     In my current position as Deputy Director, I oversee key functions supporting DSH's  
7 hospital operations, including, but not limited to, patient referral processing, system-wide  
8 admission coordination, data analytics, and policy and regulation development. I also oversee a  
9 portion of bed management in a collaborative process between DSH facilities, as well as between  
10 the California Department of Corrections and Rehabilitation (CDCR) and DSH. Specifically, I  
11 facilitate bed activation and planning, and oversee census and patient movement tracking and  
12 reporting. I also manage the development of patient population projections for capacity and other  
13 planning.

14          5.     Based on my DSH experience, I have knowledge of, among other things, DSH's  
15 patient population and admission types, facility design and capacity, and admission and discharge  
16 processes. Moreover, I work closely with CDCR regarding the referral, admission, and discharge  
17 of CDCR inmate patients to and from DSH under California Penal Code section 2684. That  
18 Penal Code section provides for CDCR to refer patients to DSH for treatment and for the Director  
19 of DSH, in her discretion, to accept the patient for treatment. I am familiar with the  
20 Memorandum of Understanding agreed to between CDCR and DSH and the associated policies  
21 and procedures, which govern the transfer of CDCR patients to DSH for care.

22          6.     Now, as DSH responds to the COVID-19 crisis, my duties include actively  
23 participating in the planning for the suspension of admissions and discharges, operationalizing  
24 COVID-19 responses to preadmission processes for the small number of admissions that must  
25 still occur, and tracking key metrics to assess the impact of operational changes.

26          7.     As previously discussed, DSH temporarily suspended admissions of six of its seven  
27 commitment types to help DSH combat the spread of COVID-19 to DSH's hospitals. This  
28 suspension included a 30-day suspension of patients admitted to DSH from CDCR under

1 California Penal Code section 2684. DSH temporarily suspended admissions of Penal Code  
2 section 2684 patients on March 16, 2020. DSH's COVID-19 admission suspension directives can  
3 be found online at: <https://www.dsh.ca.gov/Treatment/index.html>.

4 8. The suspension of admissions of Penal Code section 2684 patients will automatically  
5 expire at midnight on April 15, 2020, unless DSH's Director renews it.

6 9. DSH's Director will not renew the suspension and will allow it to expire. A true copy  
7 of the DSH Director's April 15, 2020 directive is attached to this declaration as Exhibit A.

8 10. For future transfers, DSH, in collaboration with CDCR, has created a protocol for  
9 transfer of *Coleman* class members to DSH. CDCR has agreed to this protocol. A true copy of  
10 the present version of the protocol is attached to this declaration as Exhibit B.

11 11. Before issuing the protocol, DSH discussed it with the Special Master and his experts.  
12 These meetings occurred on or about April 9, 2020 from 10:00 – 11:00 am PST, April 13, 2020  
13 from 3:00 – 4:00 pm PST, and April 15, 9:30 – 10:00 am PST. These meetings included  
14 discussions of the current best clinical recommendations of limiting movement of all populations  
15 to the greatest extent possible, what kind of situations would warrant transfer, what would be the  
16 appropriate screening protocols for any necessary transfers, and to what limited extent DSH could  
17 quarantine any admissions.

18 12. I understand that the protocol was also provided to Plaintiffs on or around April 13,  
19 2020.

20 13. This protocol provides a framework for temporary guidelines that outline the safest  
21 way to transfer patients from CDCR into DSH during this pandemic. This protocol is intended to  
22 mitigate as much risk as possible, given the particular vulnerability of DSH's patient population  
23 and the high number of patients in common areas. It provides for increased and focused  
24 communications between the institutions, emphasizing early medical psychiatric consultation to  
25 ensure that the psychiatric risk is balanced with the risks associated with the virus. The protocol  
26 also provides for a 14-day transfer quarantine, in the absence of COVID-19 testing, to minimize  
27 the risk of introducing the virus into DSH facilities.  
28



# Exhibit A



## Memorandum

**Date:** April 15, 2020

**Subject:** DEPARTMENT DIRECTIVE ON SUSPENSION OF PATIENT ADMISSIONS FROM THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION (CDCR)

Pursuant to Governor Gavin Newsom's Proclamation of a State of Emergency dated March 4, 2020, the Director of the Department of State Hospitals issued a Directive suspending the admission of patients placed at DSH facilities pursuant to Penal Code section 2684 (*Coleman* patients). This Directive is set to expire on April 15, 2020. On March 21, 2020, the Governor further provided the Director of the Department of State Hospitals authority to suspend any portion of the Penal Code as necessary to mitigate the effects of the COVID-19 pandemic pursuant to Executive Order N-35-20.

During the last 30 days, the Department worked closely with CDCR to develop a plan to safely resume the transfer of individuals referred to DSH from CDCR pursuant to Penal Code section 2684.

In light of the COVID-19 pandemic and current clinical guidance that facilities must maximize their efforts to prevent the introduction or slow the transmission of COVID-19 into DSH hospitals, as of April 16, 2020, *Coleman* patient admissions to DSH hospitals will resume but effectuated pursuant to temporary guidelines and protocols created by DSH and CDCR.

A handwritten signature in blue ink, appearing to read "S Clendenin".

STEPHANIE CLENDENIN  
Director

Attachment: COVID-19 Guidelines for Transfer to DSH Inpatient Care

# Exhibit B

### **COVID-19 Temporary Guidelines for Transfer to DSH Inpatient Care**

In cases where psychiatric inpatient care is required, the process for determining transfer to DSH shall be conducted as follows:

#### **I. Institution Review:**

1. Transfer out of the patient's current facility shall not proceed unless meeting the criteria below, as assessed by the treatment team:
  - a. an imminent, life-threatening emergency necessitates transfer, or
  - b. serious mental health decompensation necessitates transfer, and
  - c. the life-threatening condition or serious decompensation cannot be reasonably treated at the current institution or elsewhere within CDCR.

#### **II. Acceptance Procedure:**

1. Prior to a referral of a patient to a DSH inpatient program, CDCR Statewide Chief Psychiatrist or designee will consult with the DSH Medical Director or designee on the required transfer and the risk factors noted above. If both are in agreement, then the referral will proceed and the receiving DSH institution will also review and determine acceptance as per normal procedure and protocol. If there is agreement on the transfer of the patient to the DSH inpatient program, the receiving DSH hospital will post the acceptance.
2. If there is a disagreement between the DSH Medical Director and CDCR Statewide Chief Psychiatrist regarding the transfer of a patient to a DSH inpatient program, a second level review will be conducted by the Director of DSH with the Director of CCHCS Health Care Services.

#### **III. Communication and Documentation Requirements:**

1. The clearance shall be clearly documented by the primary care physician or psychiatrist in a transfer note, to be included in the chart, addressing the factors included below.
2. The content of the note should also be orally communicated from the sending psychiatrist or other medical physician to the Medical Director at the receiving DSH institution so appropriate measures can be taken prior to patient arrival.
3. The above oral communication must be documented.

#### **IV. Quarantine:**

1. As with all current DSH admissions, transfers for DSH-Coalinga, DSH-Atascadero, and DSH-Patton must take place in a manner that minimizes the risk for transmission of COVID-19. Therefore, in the absence of testing, all interagency Mental Health transfer patients shall be quarantined for 14 days either pre or post transfer.

#### **V. DSH Discharges:**

1. *Coleman* class members will be discharged when clinically appropriate.
2. *Coleman* class member discharges will be discussed between the DSH Medical Director or designee and the CDCR Director of Health Care Services or designee.
3. If quarantine is needed this will happen in the reverse for DSH to CDCR returns according to CDCR/CCHCS Policy.



VI. Transfer Note Documentation: The following information shall be included in the transfer note:

1. Title Note: Medical screening transfer note
2. Referring Institution
3. Receiving Institution
4. Does the patient have a new or worsening cough? [Y/N]
5. Does the patient have a fever (>100 F)? [Y/N]
6. Is the patient experiencing new or worsening shortness of breath? [Y/N]
7. Is the patient currently on isolation? [Y/N]
8. Is the patient currently on quarantine? [Y/N]
9. Is the patient known to be a contact of a confirmed COVID -19 case? [Y/N]
10. Include the patient's vitals for the last 14 days as available
11. Rationale for recommending transfer.