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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND**

MARCIANO PLATA, et al.,
Plaintiffs,
v.
GAVIN NEWSOM., et al.,
Defendants.

Case No. C01-1351 JST

**DECLARATION OF MICHAEL W. BIEN
IN SUPPORT OF PLAINTIFFS'
EMERGENCY MOTION [ECF 3266]**

1 I, Michael W. Bien, declare:

2 1. I am an attorney duly admitted to practice before this Court. I am a partner
3 in the law firm of Rosen Bien Galvan & Grunfeld LLP, counsel of record for Plaintiffs in
4 *Coleman v. Newsom*, No. 90-0520 KJM DB (E.D. Cal.). I have personal knowledge of
5 the facts set forth herein, and if called as a witness, I could competently so testify. I
6 make this declaration in support of the Plaintiffs' emergency motion in *Plata v. Newsom*
7 regarding prevention and management of COVID-19 in California prisons [ECF
8 No. 3266].

9 2. The Governor, in Executive Order N-25-20, issued on March 12, 2020,
10 invoked emergency powers to "commandeer property-hotels and other places of
11 temporary residence, medical facilities as necessary for quarantining, isolating or treating
12 individuals who test positive for COVID-19 or who have had a high-risk exposure and
13 are thought to be in the incubation period." *Id.* ¶ 8. A true and correct copy of the
14 Executive Order is attached hereto as **Exhibit 1** and available at
15 [https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf)
16 [19.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf) (last accessed Apr. 14, 2020). As shown on the California Department of General
17 Services' webpage identifying and describing all types of state-owned property, there are
18 numerous available properties in California that the State may be able to use to
19 temporarily house class members. See <https://spigis.apps.dgs.ca.gov/> (last accessed Apr.
20 14, 2020).

21 3. On April 8, 2020, I participated in a telephonic meet and confer with
22 counsel for CDCR in *Coleman* related to COVID-19 planning. Defendants stated that
23 their current plan did not specifically prioritize moving *Coleman* patients with risk factors
24 for COVID-19 out of densely populated areas. Defendants also stated they were still in
25 the process of gathering information to allow calculation of the physical distancing
26 currently possible for each set of class members at each institution and level of care.
While they were able to provide the total square footage of *buildings* that contained

1 dorms within CDCR's facilities, that information included all communal areas, control
2 booths, guard towers, solid walls, etc. Defendants did not provide square footage
3 information specific to the bed space of each dorm, and did not have any further update
4 regarding when they would have that information. In response to questions posed by
5 Plaintiffs' counsel during the meet and confer, Defendants stated that they did not have a
6 specific methodology for calculating the number of people each dorm could house to
7 achieve the requisite physical distancing. Defendants were not able to provide a date by
8 which they will achieve appropriate physical distancing for the *Coleman* class.

9 4. Also during the April 8, 2020 meet and confer, Defendants stated that other
10 than moving 46 female inmates from Folsom Women's Facility (FWF) to McFarland
11 Female Community Reentry Facility, and an unspecified number of male inmates to a
12 second outside facility with which CDCR already has a contract, Defendants did not
13 currently have a concrete plan to temporarily house additional inmates in facilities
14 outside of its 35 institutions. Defendants stated they did not currently have a sense of the
15 total number of inmates that they would need to move from occupied to unoccupied
16 spaces within the 35 prisons in order to feel comfortable with the level of physical
17 distancing in all the various housing settings.

18 5. I have personally encouraged Defendants to identify and secure facilities
19 outside of the prison system to safely house class members and to reduce the density of
20 the overcrowded prisons. Attached hereto as **Exhibit 2** is a true and correct copy of an
21 email dated March 20, 2020, that I sent to Kelli Evans, Chief Deputy Legal Affairs
22 Secretary in the Office of the Governor, and a memorandum I attached to that email
23 published by the Community Oriented Correctional Health Services entitled "Addressing
24 the Needs of Justice-Involved People During the COVID-19 Pandemic: An 1135 Waiver
25 Approach." I sent this memorandum to Ms. Evans in order to provide her with
26 information on how States can request that the Health and Human Services Secretary,
pursuant to Section 1135 of the Social Security Act, waive certain Medicare, Medicaid

1 and CHIP requirements to ensure availability of health care services for Medicaid
2 beneficiaries. By requesting Section 1135 waivers, the State could allow for emergency
3 medical and mental health facilities to be created to specifically serve individuals from
4 correctional institutions.

5 6. Attached hereto as **Exhibit 3** is a true and correct copy of an email dated
6 March 24, 2020, that I sent to Ms. Evans, identifying several available adult, skilled
7 nursing and hospital facilities in California that Defendants could use to house class
8 members. The facilities identified in my email include: St Vincent's Hospital in Los
9 Angeles (500 beds), Sonoma Developmental Center in Sonoma County, St. Louise
10 Hospital near Gilroy (150 beds), Castle Air Force Base in Atwater, McClellan Air force
11 Base in Sacramento, Alameda Naval Station, Fort Ord, and Camp Roberts near Paso
12 Robles. My email also provided publicly available information about closed military
13 bases in California. See http://www.formerbases.com/california_northern.htm.

14 7. Attached hereto as **Exhibit 4** is a true and correct copy of a webpage dated
15 April 8, 2020 published by the Legislative Analyst's Office entitled, "COVID-19 and the
16 National Guard," available at
17 [https://lao.ca.gov/Publications/Report/4218?utm_source=laowww&utm_medium=email](https://lao.ca.gov/Publications/Report/4218?utm_source=laowww&utm_medium=email&utm_campaign=4218)
18 [&utm_campaign=4218](https://lao.ca.gov/Publications/Report/4218?utm_source=laowww&utm_medium=email&utm_campaign=4218). As described therein, on March 22, 2020, President Trump
19 authorized the National Guard in California to serve under Title 32 of the U.S. Code in
20 order the support the State's COVID-19 response efforts.

21 8. In February 2020, Defendants engaged in a search for available vacant
22 spaces appropriate to house vulnerable persons who may have been exposed to or
23 contracted COVID-19 on cruise ships and were then repatriated by the federal
24 government and housed at Travis Air Force Base. According to a declaration filed in
25 federal court by Dr. Mark Ghaly, the Secretary of the California's Health and Human
26 Services Agency (CHHS), on February 23, 2020, his agency considered several facilities
around the state including "Sonoma Developmental Center, Army National Guard Camp

1 Roberts and closed youth correctional facilities.” Ghaly Decl. ¶ 12. A true and correct
2 copy of Dr. Ghaly’s declaration and the associated pleadings in the matter *City of Costa*
3 *Mesa v. United States*, Case No. 8:20-cv-00368-JLS (JDE) (S.D. Cal.), is attached hereto
4 as **Exhibit 5**. Dr. Ghaly declared that “[a]ny facility selected needed to meet the very
5 strict CDC sheltering criteria, which includes individual rooms and bathrooms for each
6 patient.” Ghaly Decl. ¶ 12. The safe and appropriate location identified was the Fairview
7 Developmental Center in Orange County that was very recently closed by the State, “with
8 the last patient moving out on February 24, 2020.” Ghaly Decl. ¶ 14. Based on my
9 review of publicly available information, it is my understanding that Fairview
10 Developmental Center has housed more than 900 patients and was licensed as a hospital
11 and skilled nursing facility. See [https://www.dds.ca.gov/services/state-facilities/fairview-
13 dc/](https://www.dds.ca.gov/services/state-facilities/fairview-
12 dc/) (last accessed Apr. 14, 2020). Other Developmental Centers, which provide inpatient
14 care and treatment to people with intellectual disabilities, could be used to temporarily
15 house class members. It is my understanding that the State has closed four large
16 Developmental Centers and one state-operated community facility, but continues to
17 operate one Developmental Center, one community facility, and two acute crisis homes.
18 See <https://www.dds.ca.gov/services/state-facilities/> (last accessed Apr. 14, 2020).

16 9. Attached hereto as **Exhibit 6** is a true and correct copy of CDCR’s
17 COVID-19 Preparedness webpage, last updated on April 13, 2020 and available at
18 <https://www.cdcr.ca.gov/covid19/>. According to this web posting, CDCR has suspended
19 transfers of inmates into the Male Community Reentry Program (MCRP), the Custody to
20 Community Transitional Reentry Program (CCTRP), the Alternative Custody Program
21 (ACP), and to the Conservation Camp program until further notice. It is my
22 understanding that *Coleman* class members at the EOP and CCCMS levels of care are
23 eligible to participate in the MCRP.

23 10. Defendants should investigate other options for housing inmates outside its
24 35 institutions. For example, it is my understanding that Defendants currently have

1 contracts with the following Modified Community Correctional Facilities: Golden State
2 Modified Community Golden State Modified Community Correctional Facility (700
3 beds); Desert View Modified Community Correctional Facility (700 beds); Shafter
4 Modified Community Correctional Facility (640 beds); Taft Modified Community
5 Correctional Facility (600 beds); Delano Modified Community Correctional Facility (578
6 beds); and McFarland Female Community Reentry Facility (300 beds). Alex Gourse, an
7 associate employed at my firm working under my direction and supervision, obtained this
8 publically available information via the following webpages:

9 <https://www.cdcr.ca.gov/adult-operations/reentry-services/> (last accessed Apr. 14, 2020);

10 <https://www.cdcr.ca.gov/facility-locator/community-correctional-facilities/> (last accessed

11 Apr. 14, 2020). I also understand that Defendants previously had contracts with the

12 following private facilities: Central Valley Modified Community Correctional Facility in

13 La Palma, Arizona; North Lake Correctional Facility in Michigan; North Fork

14 Correctional Center in Oklahoma; Florence Correctional Facility in Arizona; and

15 Tallahatchie Correctional Facility in Mississippi. Mr. Gourse provided me with this

16 information, which is publicly available. *See*

17 [https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-](https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-rehabilitation-ends-contract-with-private-prison/)

18 [rehabilitation-ends-contract-with-private-prison/](https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-rehabilitation-ends-contract-with-private-prison/) (last accessed Apr. 14, 2020);

19 [https://www.bakersfield.com/news/cdcr-to-stop-using--bed-private-prison-in-](https://www.bakersfield.com/news/cdcr-to-stop-using--bed-private-prison-in-mcfarland/article_37bffd4-a4f4-11e9-b8c2-cf04c887b93c.html)

20 [mcfarland/article_37bffd4-a4f4-11e9-b8c2-cf04c887b93c.html](https://www.bakersfield.com/news/cdcr-to-stop-using--bed-private-prison-in-mcfarland/article_37bffd4-a4f4-11e9-b8c2-cf04c887b93c.html);

21 [https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-](https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-rehabilitation-ends-contract-with-private-prison/)

22 [rehabilitation-ends-contract-with-private-prison/](https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-rehabilitation-ends-contract-with-private-prison/) (last accessed Apr. 14, 2020);

23 [https://www.privateprisonnews.org/media/publications/cdcr_termination_letter_and_cont](https://www.privateprisonnews.org/media/publications/cdcr_termination_letter_and_contract_geo_group_sept_2011.pdf)

24 [ract_geo_group_sept_2011.pdf](https://www.privateprisonnews.org/media/publications/cdcr_termination_letter_and_contract_geo_group_sept_2011.pdf) (last accessed Apr. 14, 2020).

25 11. Based on my review of publicly available information, it is my
26 understanding that Porterville Developmental Center (PDC), located at 26501 Avenue
140, Porterville, CA 93257, is on about 670 acres in the Sierra Nevada foothills of Tulare

1 County, outside the town of Porterville. PDC housed more than 2,600 people at its peak
2 in 1958. It has two components, the General Treatment Area (“GTA”) and the Secure
3 Treatment Program (“STP”). I understand that it had 203 people between the two
4 programs as of February 26, 2020, but historical data from September 1999 showed 849
5 people living there. I learned this by accessing the following website on April 9, 2020:
6 <https://www.dds.ca.gov/Porterville/PortervillePop.cfm>. That link, unfortunately, no
7 longer works. The GTA provides 24-hour residential services for individuals 18 years or
8 older who have serious medical and/or behavioral problems for which appropriate
9 services are not currently available through community resources. PDC has medical
10 facilities licensed by the CDPH to provide general acute medical services, skilled nursing
11 services, and intermediate care services. *See* [https://www.dds.ca.gov/services/state-
12 facilities/porterville-dc/](https://www.dds.ca.gov/services/state-facilities/porterville-dc/).

12 12. Another Developmental Center that could be used to temporarily house
13 incarcerated people is Canyon Springs Community Facility. Based on my review of
14 publicly available information, it is my understanding that this facility is located at 69-
15 696 Ramon Road, Cathedral City, CA 92234, in Riverside County. Canyon Springs
16 opened in 2000, and is a 57,000 square foot community facility that is privately owned
17 and leased by the California Department of Developmental Services (CDDS) to provide
18 residential services, treatment, and training for up to 55 adults. I understand that the
19 facility originally operated as a private inpatient mental health treatment center. *See*
20 <https://www.dds.ca.gov/services/state-facilities/canyon-springs/> (last accessed Apr. 14,
21 2020).

22 13. Another available Developmental Center is the Sonoma Developmental
23 Center. Based on my review of publicly available information, it is my understanding
24 that this facility closed in December 2018. It is located at 15000 Arnold Drive, Eldridge,
25 CA 95431, between the City of Sonoma and Santa Rosa, on more than 800 acres of land.
26 It has a multitude of cottages on both sides of Arnold Drive that housed people with

1 developmental disabilities. I understand that its highest reported population in the past 25
2 years was 1,164, in December 1994. I learned this from accessing the following website
3 on April 9, 2020: <https://www.dds.ca.gov/Porterville/PortervillePop.cfm>. That link,
4 unfortunately, no longer works.

5 14. Based on my review of publicly available information, it is my
6 understanding that in addition to temporarily transferring inmates to the aforementioned
7 Developmental Centers, Defendants could house class members in Division of Juvenile
8 Justice (DJJ) facilities, which I understand are currently at less than 40% capacity. See
9 <https://lao.ca.gov/Publications/Report/3998> (last accessed Apr. 14, 2020).

10 I declare under penalty of perjury under the laws of the United States of America
11 that the foregoing is true and correct, and that this declaration is executed at San
12 Francisco, California this 14th day of April, 2020.

13 */s/ Michael W. Bien*

14 Michael W. Bien

EXHIBIT 1

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER N-25-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS despite sustained efforts, the virus remains a threat, and further efforts to control the spread of the virus to reduce and minimize the risk of infection are needed; and

WHEREAS state and local public health officials may, as they deem necessary in the interest of public health, issue guidance limiting or recommending limitations upon attendance at public assemblies, conferences, or other mass events, which could cause the cancellation of such gatherings through no fault or responsibility of the parties involved, thereby constituting a force majeure; and

WHEREAS the Department of Public Health is maintaining up-to-date guidance relating to COVID-19, available to the public at <http://cdph.ca.gov/covid19>; and

WHEREAS the State of California and local governments, in collaboration with the Federal government, continue sustained efforts to minimize the spread and mitigate the effects of COVID-19; and

WHEREAS there is a need to secure numerous facilities to accommodate quarantine, isolation, or medical treatment of individuals testing positive for or exposed to COVID-19; and

WHEREAS, many individuals who have developmental disabilities and receive services through regional centers funded by the Department of Developmental Services also have chronic medical conditions that make them more susceptible to serious symptoms of COVID-19, and it is critical that they continue to receive their services while also protecting their own health and the general public health; and

WHEREAS individuals exposed to COVID-19 may be temporarily unable to report to work due to illness caused by COVID-19 or quarantines related to COVID-19 and individuals directly affected by COVID-19 may experience potential loss of income, health care and medical coverage, and ability to pay for housing and basic needs, thereby placing increased demands on already strained regional and local health and safety resources such as shelters and food banks; and

WHEREAS in the interest of public health and safety, it is necessary to exercise my authority under the Emergency Services Act, specifically Government Code section 8572, to ensure adequate facilities exist to address the impacts of COVID-19; and

WHEREAS under the provisions of Government Code section 8571, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567, 8571 and 8572, do hereby issue the following order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1. All residents are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19.
2. For the period that began January 24, 2020 through the duration of this emergency, the Employment Development Department shall have the discretion to waive the one-week waiting period in Unemployment Insurance Code section 2627(b)(1) for disability insurance applicants who are unemployed and disabled as a result of the COVID-19, and who are otherwise eligible for disability insurance benefits.
3. For the period that began January 24, 2020 through the duration of this emergency, the Employment Development Department shall have the discretion to waive the one-week waiting period in Unemployment Insurance Code section 1253(d) for unemployment insurance applicants who are unemployed as a result of the COVID-19, and who are otherwise eligible for unemployment insurance benefits.
4. Notwithstanding Health and Safety Code section 1797.172(b), during the course of this emergency, the Director of the Emergency Medical Services Authority shall have the authority to implement additions to local optional scopes of practice without first consulting with a committee of local EMS medical directors named by the EMS Medical Directors Association of California.
5. In order to quickly provide relief from interest and penalties, the provisions of the Revenue and Taxation Code that apply to the taxes and fees administered by the Department of Tax and Fee Administration, requiring the filing of a statement under penalty of perjury setting forth the facts for a claim for relief, are suspended for a period of 60 days after the date of this Order for any individuals or businesses who are unable to file a timely tax return or make a timely payment as a result of complying with a state or local public health official's imposition or recommendation of social distancing measures related to COVID-19.
6. The Franchise Tax Board, the Board of Equalization, the Department of Tax and Fee Administration, and the Office of Tax Appeals shall use their administrative powers where appropriate to provide those individuals and businesses impacted by complying with a state or local public health official's imposition or recommendation of social

distancing measures related to COVID-19 with the extensions for filing, payment, audits, billing, notices, assessments, claims for refund, and relief from subsequent penalties and interest.

7. The Governor's Office of Emergency Services shall ensure adequate state staffing during this emergency. Consistent with applicable federal law, work hour limitations for retired annuitants, permanent and intermittent personnel, and state management and senior supervisors, are suspended. Furthermore, reinstatement and work hour limitations in Government Code sections 21220, 21224(a), and 7522.56(b), (d), (f), and (g), and the time limitations in Government Code section 19888.1 and California Code of Regulations, title 2, sections 300-303 are suspended. The Director of the California Department of Human Resources must be notified of any individual employed pursuant to these waivers.
8. The California Health and Human Services Agency and the Office of Emergency Services shall identify, and shall otherwise be prepared to make available—including through the execution of any necessary contracts or other agreements and, if necessary, through the exercise of the State's power to commandeer property – hotels and other places of temporary residence, medical facilities, and other facilities that are suitable for use as places of temporary residence or medical facilities as necessary for quarantining, isolating, or treating individuals who test positive for COVID-19 or who have had a high-risk exposure and are thought to be in the incubation period.
9. The certification and licensure requirements of California Code of Regulations, Title 17, section 1079 and Business and Professions Code section 1206.5 are suspended as to all persons who meet the requirements under the Clinical Laboratory Improvement Amendments of section 353 of the Public Health Service Act for high complexity testing and who are performing analysis of samples to test for SARS-CoV-2, the virus that causes COVID-19, in any certified public health laboratory or licensed clinical laboratory.
10. To ensure that individuals with developmental disabilities continue to receive the services and supports mandated by their individual program plans threatened by disruptions caused by COVID-19, the Director of the Department of Developmental Services may issue directives waiving any provision or requirement of the Lanterman Developmental Disabilities Services Act, the California Early Intervention Services Act, and the accompanying regulations of Title 17, Division 2 of the California Code of Regulations. A directive may delegate to the regional centers any authority granted to the Department by law where the Director believes such delegation is necessary to ensure services to individuals with developmental disabilities. The Director shall describe the need justifying the waiver granted in each directive and articulate how the waiver is necessary to protect the public health or safety from the threat of COVID-19 or necessary to ensure that services to individuals with developmental disabilities are not disrupted. Any waiver granted by a directive shall expire 30 days from the date of its issuance. The Director may grant one or more 30-day extensions if the waiver continues to be necessary

to protect health or safety or to ensure delivery of services. The Director shall rescind a waiver once it is no longer necessary to protect public health or safety or ensure delivery of services. Any waivers and extensions granted pursuant to this paragraph shall be posted on the Department's website.

11. Notwithstanding any other provision of state or local law, including the Bagley-Keene Act or the Brown Act, a local legislative body or state body is authorized to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to attend and to address the local legislative body or state body, during the period in which state or local public officials impose or recommend measures to promote social distancing, including but not limited to limitations on public events. All requirements in both the Bagley-Keene Act and the Brown Act expressly or impliedly requiring the physical presence of members, the clerk or other personnel of the body, or of the public as a condition of participation in or quorum for a public meeting are hereby waived.

In particular, any otherwise-applicable requirements that

- (i) state and local bodies notice each teleconference location from which a member will be participating in a public meeting;
- (ii) each teleconference location be accessible to the public;
- (iii) members of the public may address the body at each teleconference conference location;
- (iv) state and local bodies post agendas at all teleconference locations;
- (v) at least one member of the state body be physically present at the location specified in the notice of the meeting; and
- (vi) during teleconference meetings, a least a quorum of the members of the local body participate from locations within the boundaries of the territory over which the local body exercises jurisdiction

are hereby suspended, on the conditions that:

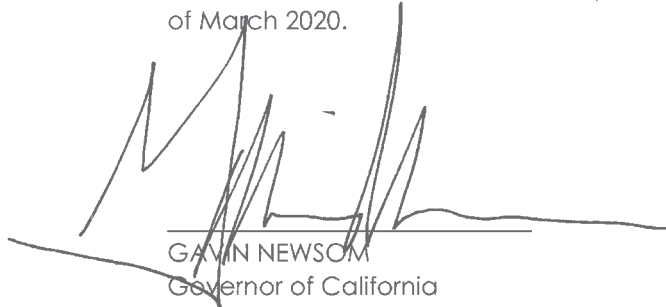
- (i) each state or local body must give advance notice of each public meeting, according to the timeframe otherwise prescribed by the Bagley-Keene Act or the Brown Act, and using the means otherwise prescribed by the Bagley-Keene Act or the Brown Act, as applicable; and
- (ii) consistent with the notice requirement in paragraph (i), each state or local body must notice at least one publicly accessible location from which members of the public shall have the right to observe and offer public comment at the public meeting, consistent with the public's rights of access and public comment otherwise provided for by the Bagley-Keene Act and the Brown Act, as applicable (including, but not limited to, the requirement that such rights of access and public comment be made available in a manner consistent with the Americans with Disabilities Act).

In addition to the mandatory conditions set forth above, all state and local bodies are urged to use sound discretion and to make reasonable efforts to adhere as closely as reasonably possible to the provisions of the Bagley-Keene Act and the Brown Act, and other applicable local laws regulating the conduct of public meetings, in order to maximize transparency and provide the public access to their meetings.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 12th day of March 2020.



A handwritten signature in black ink, appearing to read 'Gavin Newsom', is written over a horizontal line. The signature is stylized and somewhat messy.

GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State

EXHIBIT 2



From: Michael W. Bien
Sent: Friday, March 20, 2020 7:14 AM
To: Kelli Evans
Subject: Hospital access
Attachments: COVID-19-Justicie-Involved-1135-Waiver.pdf; ATT00001.txt

<https://cochs.org/files/medicaid/COVID-19-Justicie-Involved-1135-Waiver.pdf>



Addressing the Needs of Justice-Involved People During the COVID-19 Pandemic: An 1135 Waiver Approach

Daniel Mistak, MS, MA, JD

dmistak@cochs.org

COVID19 represents a grave and disproportionate threat to incarcerated people. The COVID19 pandemic is laying bare an essential truth of our health care system: The health of justice-involved individuals is deeply intertwined with the health of the broader community. Circulation of the virus in jails and prisons will drive the overall epidemic curve upwards and have catastrophic consequences on justice-involved individuals and broader population health. The needs of justice-involved people and the urgency of reducing the growth of the pandemic will require addressing barriers to care inside and outside the walls. Correctional facilities across the country are identifying ways to reduce the number of incarcerated individuals in order to avoid the coming tsunami. These practices are essential to good management of the health of the entire population. As state health and corrections officials act swiftly to mitigate the spread of COVID19, however, 1135 Medicaid waivers could provide an opportunity to address the needs of the justice-involved population and promote public health.

Hospitals and corrections face daunting challenges during this crisis

Approaches are needed that promote public health and reduce burdens on health care providers and correctional systems. Few, if any, correctional facilities are capable of handling the volume of individuals with COVID19-related symptoms. Correctional facilities typically send high-acuity patients to local hospitals, where Medicaid pays for in-patient hospitalizations for low-income inmates. Hospital capacity is widely expected to be extremely strained, and these pressures are raising concerns that as providers confront allocating limited resources among extremely ill patients, justice-involved people may be disadvantaged. Before this crisis, correctional staff were required to accompany the patient during their stay at the hospital. Following such protocols now would will quickly overburden justice

¹ <https://www.nytimes.com/interactive/2020/03/17/upshot/hospital-bed-shortages-coronavirus.html>

and health staff. In order to alleviate the pressure on the hospital system and the correctional staff, a solution is required that will simultaneously reduce the pressures on both systems. Emergency actions taken by state and local governments must contemplate how to plan for high acuity needs of incarcerated patients who become ill, and the staffing resources to care for those who remain incarcerated. 1135 Medicaid waivers, which during emergencies enable providers not to comply with some federal regulatory requirements, provide a mechanism for addressing some of these challenges.

Medicaid guidance describes limits on possible solutions

By law, Medicaid does not finance services for people who are incarcerated, with the exception of inpatient hospital stays that exceed twenty-four hours. However, federal guidance places limits on the institutions that qualify for Medicaid coverage of these services. The rationale from CMS was to ensure that our health system did not blindly import the punitive and isolating features of incarceration. To avoid creation of hospitals, nursing facilities or other medical institutions operated primarily or exclusively to serve inmates in 2016 CMS provided guidance that classified these institutions as ‘correctional institutions,’ thus excluding them from Medicaid coverage.² While CMS’ rationale is appropriate for creating a health-centered care system, locked facilities that serve justice-involved individuals in this time of crisis would reduce the burden on hospital staff and remove the need for one-to-one correctional officer support. Further, these facilities would be able to operate in close relationship to health care systems and improve the standard of care for justice-involved individuals.

Additionally, federal guidance aims to avoid creating prison units within the hospital systems. To that end, the federal guidance aims to ensure that “[f]or hospitals, the individuals are admitted to specific medical units based not on their status as inmates of a correctional institution, but rather based on their treatment needs and plan of care and generally are placed in units also serving other individuals with similar treatment needs and plans of care[.]”³ In addition, when justice-involved individuals are served in skilled nursing facilities, intermediate care facilities for individuals with intellectual disabilities, an individual must retain the right to privacy, the right to choose visitors, right to move freely, and many other rights that would negate the opportunity to bill Medicaid for life-saving services.⁴

² <https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/sho16007.pdf>

³ <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-21.pdf>

⁴ *Id.*

These aims protect the rights of Medicaid beneficiaries as consumers; however, in times of crisis, these aims will lead to negative health outcomes in the face of an over-burdened health system. By allowing facilities to aggregate justice-involved individuals in specialized units the burden on correctional staff can be reduced by lowering the necessary correctional-staff-to-patient ratio.

By disallowing facilities that serve only justice-involved individuals and disallowing units that aggregate individuals based on justice status, States will not be able to create justice-involved-specific facilities that are responsive to the growing needs of justice-involved individuals who will need care. Suspending these requirements during the emergency, will empower States and local jurisdictions to work with their local health systems to create a facilities that meet the standards of care requirements of the Medicaid program while serving justice-involved individuals in units created to meet this unique moment.

Using 1135 waivers, states can develop specific approaches to health care services for people who are involved in the justice system

Policymakers have specific tools available to them during a National Emergency declared by the president. Under section 1135 of the Social Security Act, the Health and Human Services Secretary may temporarily waive certain Medicare, Medicaid and CHIP requirements at the request of states including conditions of participation and certification requirements, licensure requirements, within certain parameters; as well as preapproval and timeliness requirements. These unique, temporary measures are taken to ensure the availability of health care services for Medicaid beneficiaries and to enable providers that do not comply with some programmatic requirements to get paid for services that are provided in good faith. States are developing 1135 waivers now; the Centers for Medicare & Medicaid Services approved the first state 1135 request this week.⁵

COCHS suggests that as states contemplate requesting 1135 waivers that the state request waiving guidance offered in SHO #16-007 and S&C 16-21-ALL. Specifically:

- Allowing for facilities to be created that specifically serve individuals from correctional institutions at the same standard of care of other Medicaid beneficiaries;
- Allowing for aggregation of individuals in units designed specifically for individuals based upon their justice involvement.

⁵ <https://www.medicaid.gov/state-resource-center/downloads/fl-section-1135-appvl.pdf>

By waiving these and other portions of the guidance, emergency facilities could be created that would serve justice involved individuals whose care needs exceed the ability of correctional facilities --thereby, reducing the burden on local budgets, reducing the need for one-to-one correctional staff management, and creating avenues for novel deployment of local, state, and federal resources.

Beyond the opportunities available through 1135 waivers, states should continue to identify opportunities for meeting the needs of justice-involved individuals through 1115 waivers and legislative actions that respond to this unique time in our nation's history. As always, COCHS will continue to identify novel policy approaches to support justice-involved communities and the agencies that serve them.

EXHIBIT 3

[REDACTED]

From: Michael W. Bien
Sent: Tuesday, March 24, 2020 9:44 AM
To: [REDACTED]@gov.ca.gov
Cc: Pomeranz, Bill
Subject: FW: Some Ideas for Housing Older Prisoners [IWOV-DMS.FID6429]

Kelli

Bill is a good friend in the business of building/financing older adult, skilled nursing facilities around the country. I asked him for info on vacant/available properties. See below.

Jim Moloney, [REDACTED], is the contact for St. Vincent and St. Louise hospitals, and perhaps other properties.

Michael Bien

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From: "Pomeranz, Bill" <[REDACTED]@cainbrothers.com>
Date: March 23, 2020 at 10:00:10 AM PDT
To: "Michael W. Bien" <MBien@rbgg.com>
Subject: Some Ideas for Housing Older Prisoners

St. Vincent's Hospital in Los Angeles (500 beds) (recently closed)

Sonoma Developmental Center in Glen Elyn Sonoma (very large and intact)

St. Louise Hospital near Gilroy (150 beds)

Castle Air Force Base in Atwater Ca (moth-balled)

McClellan Air force Base in Sacramento (moth-balled) (very intact)

Alameda Naval Station (moth-balled) (very intact)

Fort Ord (very intact)

Camp Roberts (moth-balled) near Paso Robles/San Miguel Ca

Mike see this list of former military bases - many properties are still standing

http://www.formerbases.com/california_northern.htm

Sent from my iPad

Bill Pomeranz | Managing Director
Cain Brothers, a division of KeyBanc Capital Markets
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EXHIBIT 4

Budget and Policy Post

April 8, 2020

COVID-19

COVID-19 and the National Guard

As a result of the emergence of the coronavirus disease 2019 (COVID-19), the federal government is providing various types of assistance to support states as they engage in response efforts, as well as mitigate some of the associated economic impacts to businesses, local communities, and individuals. In this post, we discuss the assistance the federal government is providing to states through the National Guard.

National Guard Plays Key Role in Meeting Various Critical State and National Needs.

The National Guard includes soldiers and airmen (guardsmembers) that typically serve part time. However, the Governor or President can call on these guardsmembers to provide full-time assistance when domestic or international needs arise. For example, guardsmembers may assist with fighting wildland fires, counterdrug activities, and combat missions abroad. Typically, when the Governor calls guardsmembers, they are on state active duty. In these cases, the state is generally responsible for the costs of activating these personnel who work under the direction of the Governor. (In some cases, the federal government may reimburse the state for a portion of these costs, such as when the state receives a federal disaster declaration.) In contrast, when the President calls on guardsmembers, they are on federal active duty, and the federal government is responsible for the costs. In most cases, the President calls on guardsmembers under Title 10 of the U.S. Code. When this occurs, the guardsmembers work under the direction of the President.

National Guard Authorized Under Title 32 in Response to COVID-19. On March 22, 2020, President Trump authorized the National Guard in California to serve under Title 32 of the U.S. Code in order to support the state's COVID-19 response efforts. (Other states have also received this authorization.) From the perspective of the state, this authorization means that the federal government will cover the full cost of eligible activities performed

by the guardsmembers. We also note that unlike authorizations made under Title 10, guardsmembers serve under the direction of the Governor under Title 32—giving the state greater control over how the guardsmembers are employed.

Recent Federal Legislation Provided Additional Funding for National Guard Activities.

On March 27, 2020, Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act (H.R. 748). Among other things, this legislation provides about \$1.4 billion to support the National Guard’s response to COVID-19 nationwide. At the time this post was prepared, the Secretary of Defense authorized California to receive \$48 million of this amount to support the equivalent of 3,000 soldiers for 30 days on Title 32 status for COVID-19 related activities. However, should the state begin to deplete this funding, it can request an increase from the federal government. Accordingly, the amount of resources that will ultimately be provided to California could increase in the future depending on the state’s needs.

National Guard Engaged in Various COVID-19 Activities, Which Could Expand. At the time this post was prepared, roughly 1,000 guardsmembers were engaged in the state’s COVID-19 response efforts—specifically for a few key tasks, such as distributing of food at foodbanks, providing COVID-19 testing support, and transporting patients to medical facilities. As the state’s COVID-19 response progresses, the state will likely increase the number of guardsmembers who are supporting the state’s efforts to respond to COVID-19 and may task guardsmembers with additional responsibilities to help ensure the health and safety of the public.