IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FAVIAN BUSBY and MICHAEL EDGINGTON, on their own behalf and on behalf of those similarly situated, Plaintiffs, v. FLOYD BONNER, JR., in his official capacity, and SHELBY COUNTY SHERIFF'S OFFICE, Defendants.	)	No. 20-cv-2359-SHL-atc

ORDER DENYING DEFENDANTS' MOTION TO TERMINATE THE CONSENT DECREE

Before the Court is Defendants' Motion to Terminate the Consent Decree, (ECF No. 218), filed June 2, 2021, which has been fully briefed, as well as additional briefing filed by the Parties following a hearing on the Motion to Terminate, (ECF Nos. 254, 255), filed on August 11 and 16, 2021. The Court heard argument on the Motion on August 6 and 9, 2021, (ECF Nos. 246, 249), during which the Parties presented proof on the limited question of whether Defendants had complied with the termination provision in the Parties' Consent Decree, thus warranting termination of the Decree. (See ECF No. 161-2 at ¶ 28.)

For the reasons stated below, Defendants' Motion to Terminate the Consent Decree is **DENIED**.

Following this Order, the Court will turn to several motions which are currently pending. Plaintiffs' Motion to Enforce and to Modify the Consent Decree, (ECF No. 216), filed May 19, 2021, and fully briefed, was held in abeyance pending the Court's adjudication of the Motion to Terminate, (see ECF No. 233). In connection with this Motion, the Court denied as premature

Plaintiffs' Motion for Discovery on an Expedited Basis as to the request for discovery into issues raised in their Motion to Enforce and Modify Consent Decree. (See ECF Nos. 224, 233.) The Parties are **DIRECTED** to confer and file a Notice on the docket as to how they would like to proceed on these Motions within **7 days** of the entry of this Order.

BACKGROUND[1]

Defendants seek to terminate the Consent Decree, agreed to by the Parties in a settlement of Plaintiffs' class action for declarative and injunctive relief and/or a writ of habeas corpus under 48 U.S.C. § 2241 as well Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act, which was made effective upon its filing with the Court on January 22, 2021, (ECF No. 161-2), and approved on a preliminary basis by the Court on January 28, 2021, (ECF No. 162). After the Parties resolved issues that were brought to the Court's attention regarding effective notice to the class, (ECF Nos. 176, 181), the Court granted final approval of the Settlement on April 12, 2021, (ECF No. 209). On June 2, 2021, Defendants determined that they had fully complied with the Consent Decree's termination provision and moved to terminate the Decree. Specifically, Defendants contend that they have complied with subsection (b) of Paragraph 28,[2] which provides that the Consent Decree will terminate when:

> an FDA-approved COVID-19 vaccine is offered to and administered according to FDA guidelines to all detainees housed at the Jail for a period of more than

[1] For a more detailed recitation of the background of this case, see the Court's Order Granting In Part and Denying In Part Plaintiffs' Motions to Postpone the Effective Date of the Stay and For Discovery On An Expedited Basis and Holding In Abeyance Plaintiffs' Motion to Enforce and to Modify Consent Decree and Defendants' Motion to Terminate Consent Decree, (ECF No. 233), the Court's Order Granting Final Approval of Class Action Settlement, (ECF No. 209), and the Court's Order Denying Plaintiffs' Motion for Preliminary Injunction, (ECF No. 124).

[2] Subsection (a) of Paragraph 28 provides that the Consent Decree may also terminate when the Centers for Disease Control and Prevention ("CDC") and the Tennessee Department of Health declare "that the COVID-19 pandemic is over and/or has ended[.]" (ECF No. 161-2 at ¶ 28.) This subsection is, of course (and unfortunately), inapplicable.

> fourteen (14) days and who accept a vaccination, along with educational materials about the vaccine and non-punitive incentives to take the vaccine. Upon termination of this Decree pursuant to this Paragraph, the parties shall inform the Court and the Court shall enter a final judgment of dismissal.

(ECF No. 161-2 at ¶ 28.)

After Defendants filed their Motion, Plaintiffs filed Motions to Postpone the Effective Date of the Stay and for Discovery on an Expedited Basis. (ECF Nos. 223, 224.) On August 6 and 9, 2021, the Court held a hearing on the pending Motions, which also included Plaintiffs' Motion to Enforce and to Modify the Consent Decree, (ECF No. 216), after which the Court entered an Order granting Plaintiffs' Motion for Postponement of the Effective Date of the Stay, granting in part Plaintiffs' Motion for Discovery on an Expedited Basis, setting a hearing on Defendants' Motion to Terminate, and holding Plaintiffs' Motion to Enforce and to Modify the Consent Decree in abeyance. The Court's determination that a hearing on the Motion to Terminate was necessary constituted good cause to postpone the 18 U.S.C. § 3626(e) automatic stay for 60 days as permitted by 18 U.S.C. § 3626 (e)(3), to August 31, 2021. The Court set an expedited schedule for the Parties to conduct discovery and set an August 6th hearing on Defendants' Motion to Terminate. (ECF No. 233.)

Although the hearing on Defendants' Motion to Terminate began on August 6, 2021, as scheduled, it was not completed that day and continued on August 9, 2021, with Defendants' rebuttal. Defendants presented Chief Kirk Fields as their only witness both in their case in chief and on rebuttal. Plaintiffs presented expert witness Dr. Stefano Bertozzi, the Court's Independent Inspector Mike Brady, and Detainee-witnesses Brandon Hibbler, Ronnie Woods, and Richard Wright. Collectively, the Parties introduced 32 exhibits. Additionally, between the hearings, Plaintiffs filed excerpts from Chief Fields' deposition testimony, (ECF No. 248), to

which Defendants responded with the filing of their own excerpts from Chief Fields' deposition testimony after the conclusion of the hearing, (ECF No. 253).

At the end of the hearing, the Court set a schedule for additional post-hearing briefing. (ECF No. 249.) Plaintiffs filed a Post-Hearing Brief in Opposition to Defendants' Motion to Terminate the Consent Decree, (ECF No. 254), on August 11, 2021, and Defendants filed a Response on August 16, 2021, (ECF No. 255). Finally, Plaintiffs filed the Final Report of Independent Inspector Mike Brady's Fourth Covid-19 Follow Up Inspection of the Jail as a Supplemental Exhibit on August 26, 2021. (ECF No. 257-1.)[3]

LEGAL STANDARD

In the typical case subject to the Prison Litigation Reform Act of 1995, 18 U.S.C. 18 U.S.C. § 3626(b), "prospective relief" is "terminable upon the motion of any party—2 years after the date the court granted or approved the prospective relief." 18 U.S.C. § 3626(b)(1)(i). However, prospective relief "shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3). A circuit split exists as to which party bears the burden of demonstrating that there are, or are not, ongoing constitutional violations and that the relief is narrowly drawn. Compare Coleman v. Brown, 938 F. Supp. 2d 955, 959–60 (E.D. Cal. 2013) (quoting Graves v. Arpaio, 623 F.3d 1043, 1048 (9th Cir.2010)) ("[a]s the moving party, defendants have the burden of demonstrating 'that there are no ongoing constitutional violations,

[3] The Court notes that Plaintiffs also filed Mr. Brady's Fourth Inspection Report at ECF No. 256, in support of their Motion to Enforce and to Modify the Consent Decree. (ECF No. 216.)

that the relief ordered exceeds what is necessary to correct an ongoing constitutional violation, or both'") with Guajardo v. Texas Dep't of Crim. Just., 363 F.3d 392, 395 (5th Cir. 2004) (after a defendant seeking termination allows for the requisite passage of time, "the burden of proof then shifts to the prisoners to demonstrate ongoing violations and that the relief is narrowly drawn").

Here, as the Court observed in its recent Order concerning the Parties' various cross-motions, the Court has not had the occasion to reach or rule on alleged ongoing violations of Federal rights. Moreover, Defendants' Motion was not brought after the 2-year period prescribed by § 3626(b)(1)(i). As noted in the Court's recent Order, Defendants' Motion is properly viewed under § 3626(b)(4), which permits a Motion to Terminate to be brought at any time by any party if legally permissible. Given this posture, the authority above is not perfectly apposite. The issue then before the Court is a narrow question of contract interpretation—whether Defendants have met the requirements of the termination provision in the Consent Decree. Thus, the Court finds that Defendants, who have brought the Motion to Terminate on the basis of their asserted compliance with the Consent Decree's termination provision, bear the burden of proof. Peery v. City of Miami, 977 F.3d 1061, 1073 (11th Cir. 2020) (holding, in a non-PLRA context, that "[t]he party seeking to terminate a consent decree 'bears a heavy burden of persuasion' to justify termination").

ANALYSIS

In the Court's recent Order concerning the Parties' various cross-motions, including Defendants' Motion to Terminate, (ECF No. 233), the Court opened with few words about consent decrees, which bear repeating here. Consent decrees "are at once both contracts and orders, . . . construed largely as contracts, but [] enforced as orders." Berger v. Heckler, 771 F.2d 1556, 1567–68 (2d Cir. 1985) (citing United States v. ITT Continental Baking Co., 420

U.S. 223, 236 n. 10 (1975) and Schurr v. Austin Galleries, 719 F.2d 571, 574 (2d Cir.1983)). They "must be construed to preserve the position for which the parties bargained." Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Michigan Dep't of Nat. Res., 141 F.3d 635, 641 (6th Cir. 1998) (internal citation omitted). As with a contract, a court's role in interpreting the language of a consent decree is circumscribed; it cannot "expand or contract the agreement of the parties . . . , and the explicit language of the decree is given great weight." Berger, 771 F.2d at 1568 (citing Artvale, Inc. v. Rugby Fabrics Corp., 303 F.2d 283, 284 (2d Cir.1962) (per curiam) and Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 892–93 (9th Cir.1982)); see also Reynolds v. Roberts, 202 F.3d 1303, 1312 (11th Cir. 2000) ("As a general matter, the rules we use to interpret a consent decree are the same ones we use to interpret a contract—since a consent decree is a form of contract."); Jerome Duvall, et al., Plaintiffs, v. Lawrence, Hogan, Jr., et al., Defendants. Additional Party Names: Michael R. Resnick, Robert L. Green, No. CV ELH-94-2541, 2021 WL 2042295, at *12 (D. Md. May 21, 2021) ("[C]onsent decrees are generally construed as contracts for purposes of enforcement."). The words and language in a consent decree must be interpreted according to their plain meaning and normal usage. Berger, 771 F.2d at 1568.

As previously stated, with these principles as a guide, the Court concluded that, contrary to Plaintiffs' position, Defendant's Motion to Terminate is properly before the Court, and contrary to Defendants' position, the Consent Decree is not "self-terminating." The Court also previously determined that Defendants' Motion to Terminate turns on a discrete question—whether Defendants have complied with Paragraph 28 of the Consent Decree—and that Plaintiffs had sufficiently demonstrated the need for a hearing on the evidence. The Court reflected on the purpose that could be gleaned from Paragraph 28, and the Consent Decree overall, finding that,

per the Parties' agreement, the Decree would terminate when the detainees were no longer in danger, either because the pandemic was over or because an effective vaccination program had resulted in meaningful acceptance of the vaccine. "Paragraph 28 does not state that once a vaccine is offered, the Consent Decree is terminated. Rather, it states that a vaccine must be offered in tandem with effective communication and reinforcement of the benefits of the vaccine." (ECF No. 233 at PageID 3950.)[4] Though the Court acknowledged that it was "not the fault of Defendants that there is vaccine hesitancy, a problem that is not unique to this population or this city," it observed that "the requirements of Paragraph 28 implicitly reflect an understanding of this reality." (ECF No. 233 at PageID 3950.)

Given the narrow operation of Paragraph 28(b), the Court limited discovery to Paragraph 28(b)'s specific termination conditions—general availability of the vaccine, the provision of

[4] In their Post-Hearing brief in opposition to Defendants' Motion to Terminate, (ECF No. 254 at PageID 4894), as to the purpose of the Decree, Plaintiffs also direct the Court to the Parties' Motion for Preliminary Approval, (ECF No. 161), in which the Parties averred that the Decree contained concrete steps that Defendants would undertake "to protect against the virus' spread in the Jail," and also that the Decree would "help to minimize the spread of COVID-19 in Shelby County and Tennessee more broadly." (ECF No. 161 at PageID 3193.)

Defendants counter that the Court cannot look beyond the Consent Decree to discern the "purpose" of the Decree, which, by virtue of its existence as a document embodying opposing purposes of adversarial parties, "cannot [itself] be said to have a purpose[.]" (ECF No. 255 at PageID 4903 (quoting United States v. Armour & Co., 402 U.S. 673, 681 (1971).)

The Court does not disagree and reiterates that its discernment of the purpose of the Consent Decree is evaluated based on the Decree itself, not outside its four corners. See, e.g., Lorain NAACP v. Lorain Bd. of Educ., 979 F.2d 1141, 1148 (6th Cir. 1992). However, as the Sixth Circuit has stated, consent decrees have a "dual character," such that while their terms are construed and evaluated under contract principles, "modification may be justified when a court is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.'" Id. (quoting United States v. Swift & Co., 286 U.S. 106, 114–15 (1932)). Whether that is the case here is to be evaluated and determined in a subsequent order; as mentioned supra, the Court will turn next to Plaintiffs' Motion to Enforce and to Modify Consent Decree. (ECF No. 216.)

educational materials and non-punitive incentives to take the vaccine. The Court now analyzes the proof the Parties adduced at the hearing as to each of these conditions. As a reminder, Paragraph 28(b) provides that the Decree will terminate when (1) an FDA-approved COVID-19 vaccine is offered to and administered according to FDA guidelines to all detainees housed at the Jail for a period of more than fourteen (14) days, and who accept a vaccination, (2) along with educational materials about the vaccine and (3) non-punitive incentives to take the vaccine. (ECF No. 161-2 at ¶ 28.)

I. Availability of the Vaccine to All Detainees Housed for a Period of More than Fourteen (14) Days

The first requirement of Paragraph 28(b) is a specific obligation. The Jail must offer and, if accepted, administer the vaccine to all detainees who have been housed at the Jail for a period of more than fourteen (14) days. At the time that they filed their Motion, June 2, 2021, Defendants asserted that it had complied with this requirement. In their opposition, Plaintiffs did not challenge this specific point, but instead more broadly asserted that the low acceptance rate, then 11%, indicated that vaccine administration was a failure, thus violating the Decree.

However, at the hearing, Plaintiffs presented evidence that, around the time when Defendants prepared and filed their Motion to Terminate, they were not in compliance with this provision. Under questioning concerning Defendants' answer to one of Plaintiffs' interrogatories requesting, inter alia, each date when vaccines were offered and how many were administered on those dates, Chief Fields testified that no vaccines were administered between May 20, 2021, and June 10, 2021, 21 days. (ECF No. 251 at PageID 4581; see Ex. 21; ECF No. 244-8 at PageID 4201-02.) He further testified that the Jail ordinarily administered the vaccine every seven (7) days to everyone who accepted the offer to get the vaccine, and that the reason for the three-week gap in time was "[b]ecause of the lack of sign-ups from the detainees to receive the

vaccine." (ECF No. 251 at PageID 4581-82.) When asked if the minimum number of sign-ups was six (6), he replied that he believed "that [was] correct." (ECF No. 251 at PageID 4582.) When asked again about the three-week gap in vaccine administration, Chief Fields testified that he did not know the reason "offhand but I spoke with our health service administrator, and he informed me that that lapse in time was because we did not have enough sign-ups." (ECF No. 251 at PageID 4596-97.)

Plaintiffs later presented evidence that disputed Chief Fields' testimony as to the minimum number of sign-ups required to administer the vaccine. Independent Inspector Mike Brady testified that he was told that the minimum number of sign-ups was 26, not six (6). (ECF No. 251 at PageID 4631-32.) Mr. Brady also testified on cross-examination that he was not aware of less than 26 vaccines being administered to detainees on separate instances. (ECF No. 251 at PageID 4705.)[5]

In their Post-Hearing Response, Defendants do not attempt to clarify the 3-week period during which no vaccine was administered. Rather, they simply assert that "every detainee housed at the Jail for longer than fourteen days that has requested a COVID-19 vaccine has been

[5] The Court notes that, while the Parties dispute the minimum number of detainees required to schedule the administration of the vaccine, Defendants' response to Interrogatory No. 9, introduced as Exhibit 21 at the hearing and located at ECF No. 244-8, appears to indicate that fewer than 26 detainees received the vaccine (either the Johnson & Johnson vaccine or a first dose of the Pfizer vaccine) on April 22, 2021 (18 detainees), April 29, 2021 (21 detainees), July 1, 2021 (14 J&J administered), and July 8, 2021 (10 J&J administered). (Exhibit 21; ECF No. 244-8 at PageID 4202–03.) However, there is no way to determine, and the Parties do not elucidate, whether at least 26 detainees had signed up to receive the vaccine on those dates, but fewer than 26 actually received it because detainees had changed their minds, were released from detention at the Jail, etc. Thus, this fact remains disputed.

While specifics such as the request threshold that must be met to administer the vaccine are not outlined as requirements by the Consent Decree, what is required is that a vaccine be offered and administered to all detainees who are housed at the Jail for a period of more than 14 days and who want the shot.

provided a COVID-19 vaccine[.]" (ECF No. 255 at PageID 4905.) However, the Court notes that Chief Fields' testimony that there were not enough sign-ups during that time is at least suggestive that there could be detainees who had been at the Jail for more than 14 days, requested the vaccine during that time period, but may have been released before they received it.

When considering the meaning of this three-week gap, one can go further to see what other possibilities exist, that Defendants, who have provided no evidentiary support of their compliance, have not foreclosed. For instance, if a detainee qualified for, and requested, a vaccine on July 9, the day after a vaccine administration that occurred on July 8, 2021, was then released sometime before July 22, 2021, the next vaccine administration, he would have been detained for a period of over 14 days but not have received the vaccine. (Ex. 21; ECF No. 244-8 at PageID 4202.)

Defendants' failure to track who has requested and received the vaccination, and present evidence of their compliance with Paragraph 28(b)'s vaccine administration requirement leaves the Court with little to go on. Without this information, it is, in fact, not altogether clear how Defendants can demonstrate their compliance with Paragraph 28(b), beyond their assertions. The Court is left with a meaningful dispute about whether Defendants have complied with the requirement to offer and administer the vaccine to every detainee housed at the Jail for a period of more than 14 days since the effective date of the Decree.[6] Thus, as to this element of

[6] The Court notes that Paragraph 28(b) does not specify <u>when</u> a vaccine must be administered to a detainee who has been housed at the Jail for more than 14 days. However, the length of time a detainee who has requested a vaccine must wait to receive that vaccine, and what role longer wait times play in subsequent attrition, is a meaningful issue that gets at the intent behind this provision. Did the Parties intend for detainees to wait weeks after requesting a vaccine? Do long wait times protect Plaintiffs?

Paragraph 28(b), the Court cannot find that Defendants have met their burden to terminate the Consent Decree.

But even if the Court found this to be a closer call, meaningful disputes exist as to Paragraph 28(b)'s other requirements, as discussed in the next two sections.

II. Provision of Educational Materials

The educational materials condition of the termination provision is a significant point of contention between the Parties. Defendants have been vociferous in their assertions that

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In his Inspection Reports, including his most recent report from his visit on August 5, 2021, Mr. Brady has raised this very issue. He has asserted on multiple occasions that the Jail's failure to store vaccines onsite, and the attendant wait-times associated with the Jail's dependence on the Memphis Fire Department to administer the vaccines, renders the program ineffective. (See ECF No. 257-1 at PageID 5005.) Plaintiffs' Expert Witness Dr. Stefano Bertozzi echoed this concern at the hearing, testifying that delays in time to vaccination are delays in protection for that individual, and "of course, provides an opportunity for misinformation to come in and for that person to change their mind." (ECF No. 251 at PageID 4621.)

Turning back to Mr. Brady's Inspection Reports, he questions why the Jail does not store the vaccines on-site, which would enable Wellpath healthcare professionals to administer vaccines essentially upon request. Mr. Brady notes that storage of the Moderna and J&J vaccines would pose no technical challenges to Wellpath, as they do not require advanced refrigeration capabilities. (ECF No. 257-1 at PageID 5004–05.)

In his most recent report, Mr. Brady also expresses concern that, given the spread of the Delta variant, the Memphis Fire Department may be less available to regularly appear at the Jail to administer the vaccine on a weekly basis. (Id. at PageID 5005.) As Mr. Brady notes, the EMTs have already had to cancel vaccine administrations on two different occasions because of staffing shortages. (Id. at PageID 5028 ("Clearly the provision of vaccines to the Shelby County Jail inmate population is a very low priority for the City of Memphis.").) Recent developments are even more concerning to him. Mr. Brady cites an article in the Daily Memphian, published August 15, 2021, in which the Deputy Chief of the Memphis Fire Department Emergency Medical Services explains that the number of daily calls recently reached the highest she has ever seen, and the extreme strain on the Department has reached a level that "is not sustainable." (Id.) Mr. Brady cautions that this "does not bode well" for the Memphis Fire Department's ability to continue assisting with vaccine administration at the Jail. (Id.)

As to whether Mr. Brady's recommendation is a reasonable one, Dr. Bertozzi testified that "[e]very California prison" offers on-site vaccine administration. (ECF No. 251 at PageID 4622.)

educational materials have been provided, including written materials recommended by Mr. Brady and Plaintiffs, that information has been distributed in a myriad of ways—loose paper printouts, hanging printouts, regularly played educational/promotional videos, and opportunities for in-person conversation, including in town halls and with medical support staff who hand out detainee medications. Plaintiffs continue to challenge the efficacy of the educational materials offered as well as their actual availability/distribution. Plaintiffs also point to the vaccination rate, approximately 25%, which they assert signifies that the educational program is unquestionably failing.

Defendants' overarching position is that the Consent Decree does not require educational materials of a certain efficacy (pointing to the absence of the word "effective" in Paragraph 28(b)), and that they have gone above and beyond to provide all manner of materials to reach and educate detainees on the importance of receiving the vaccine. Plaintiffs challenge that a "bare minimum" offering does not comply with Defendants' obligations under the Consent Decree, which carries an implied covenant of good faith and fair dealing under Tennessee law and general contract principles. (ECF No. 254 at PageID 4893 (citing Goot v. Metro Gov't of Nashville & Davidson Cnty., 2005 WL 3031638, at *7 (Tenn. Ct. App. Nov. 9, 2005).)

Defendants' position cracks under closer inspection. Implied in their position is that there is, in fact, some minimum standard of efficacy, and that the materials they have provided and/or created meet that standard. Otherwise, Defendants could hang printouts with meaningless symbols, labeled "educational materials."[7] They could host town halls where no information

[7] There is dispute about where the printouts are posted, as addressed infra.

was given about the vaccine, where meaningless answers were given to detainee questions.[8] They could show videos in another language that the detainees do not speak.[9] Of course, Defendants have not done this and have not argued that they could. This would be absurd and contrary to well-settled principles of contract interpretation. See, e.g. Dick Broad. Co. of Tennessee v. Oak Ridge FM, Inc., 395 S.W.3d 653, 659 (Tenn. 2013) ("A cardinal rule of contractual interpretation is to ascertain and give effect to the intent of the parties.") (internal citation omitted). But consideration of what the complete lack of a concept of "effectiveness" looks like drives home the point that there is such a concept in the Consent Decree. Recognizing this concept, though, only leads to other questions.

First, what constitutes "educational material"? Is it determined by who provided the material (i.e., Plaintiffs, in some instances)? How is the educational value or efficacy of the material to be measured? On this latter question, Plaintiffs argue that the vaccination rate is one appropriate measure. Plaintiffs' Expert, Dr. Stefano Bertozzi, testified that the estimated vaccine rate at the Jail, around 25%, is "shockingly low," as he is "accustomed to seeing acceptance rates

[8] Plaintiffs do challenge certain facts about the town halls that have occurred at the Jail. Chief Fields testified that it was "possible" that not all housing pods have had town halls where vaccines were discussed. (ECF No. 251 at PageID 4582–83.) Indeed, one of Plaintiffs' three detainee-witnesses testified that he had not attended a town hall where COVID-19 was discussed. (ECF No. 251 at PageID 4723). On the second day of the hearing, Defendants' counsel conceded that "every housing unit has not had a town hall on COVID at this point." (ECF No. 252 at PageID 4807.)

The exact purpose of the town halls was also called into question. Mr. Brady testified that it had been represented to him that the Jail would conduct town halls exclusively on the subject of COVID-19. (ECF No. 251 at PageID 4655.) According to Mr. Brady, the fact that the town halls address topics other than COVID-19 and the vaccine diminishes the transmission and efficacy of any education information in that setting, as there is a risk of losing the attention of attendees, or conversely, never getting their attention. (Id.)

[9] Though the language of the materials has not been called into question, the reading level has, as addressed infra.

that are three times that," (ECF No. 251 at PageID 4623) and the low rate indicates that the education program is "obviously not effective." Dr. Bertozzi continued

> Without speaking to what has been done, the result is a lack of effectiveness. And it's a lack of effectiveness in the face of many other institutions that have achieved much higher rates of vaccination, including in populations of Black prisoners. So I would say that it's sort of -- it's obviously evidence of lack of effectiveness.

(ECF No. 251 at PageID 4625.)

Whatever the role of the vaccination rate in determining the effectiveness of the educational materials, or how the materials might otherwise be measured, the Court need not resolve these questions. Why? Plaintiffs have offered evidence that Defendants have not provided educational materials to every detainee housed at the Jail for more than 14 days.

Beginning first with the proof offered by Chief Fields at the hearing, Defendants introduced the following exhibits: a Vaccination Acknowledgment Form, (Ex. 1; ECF No. 245-1), a notice titled "FREE COVID-19 VACCINE!!!" that states that a detainee can place a sick call request to get the vaccine any time and that there will be no punitive action, (Ex. 2; ECF No. 245-2), a one-pager with three reasons why a person should get vaccinated (Ex. 3; ECF No. 245-3); a 4-page English and Spanish language packet about the vaccine prepared by AMEND[10] (Ex. 5, ECF No. 245-5); a 12-page English and Spanish language packet about the vaccine, also from AMEND (Ex. 6, ECF No. 245-6), a 5-page article titled "Key Things to Know about COVID-19 Vaccines," (Ex. 7, ECF No. 245-7); a 2-page document from Wellpath of post vaccination

[10] AMEND is a nonprofit arm of the University of California, San Francisco. Dr. Bertozzi testified that it is "one of the highly thought of organizations that consists of doctors, medical doctors and other professionals that develop guidance and assist with jails and prisons in the implementation of their vaccine programs in response to Covid-19." (ECF No. 251 at PageID 4684.)

information (Ex. 8; ECF No. 245-8); another 2-page document detailing three key reasons to get vaccinated (Ex. 14, ECF No. 245-14); and a compilation of posters encouraging that viewers get the vaccine (Ex. 20, ECF No. 245-16). Defendants also introduced two videos, one with President Barack Obama, Charles Barkley, and Shaquille O'Neal, discussing the vaccine and encouraging that viewers get it ("Obama video"), and the other a video called "Tuskegee Legacy Stories" [11] ("Ad Council Video"). (Exs. 10, 11.) Telephone audio prompts in English and Spanish were also offered. (Exs. 12, 13.)[12]

Regarding the various written materials, detainee-witness Brandon Hibbler testified that there are no educational materials such as hanging posters in his housing pod. (ECF No. 251 at PageID 4716.) As for other materials, Mr. Hibbler testified that he had been given one piece of

[11] Chief Fields testified that this video concerns "the Tuskegee experiment," which the Jail shows "to dispel any thoughts of any type of . . . conspiracy . . . in regards to the vaccine." (ECF No. 251 at PageID 4554.) The so-called Tuskegee Study was a study undertaken by the U.S. Public Health Service and the Tuskegee Institute in 1932, which was designed to record the progress of untreated syphilis. It was revealed decades after the study began that over 300 Black male subjects of the study were not told they had syphilis and were not treated for it, despite the introduction of penicillin. See generally, CENTERS FOR DISEASE CONTROL AND PREVENTION, *The Tuskegee Timeline*, https://www.cdc.gov/tuskegee/timeline.htm (last visited Aug. 30, 2021). In May 1997, President Clinton issued a formal apology in which he stated that the United States Government had done something that was "deeply, profoundly, morally wrong," and acknowledged that the Government's profound abandonment of the "most basic ethical precepts" created a legacy of mistrust in the African American community. The White House, Office of the Press Secretary, *Apology For Study Done in Tuskegee*, (May 16, 1997), https://clintonwhitehouse4.archives.gov/textonly/New/Remarks/Fri/19970516-898.html. The Court wonders whether a video primarily focused on this morally-bankrupt experiment accomplishes its objective in this setting, but reaches no conclusion on that question.

[12] The audio prompts are more accurately described as announcements—they announce, in English and Spanish, how a detainee can request a vaccination. The prompts do not "educate" detainees about the vaccine.

paper in April or May of last year[13] asking if he wanted to take the vaccine or not, which did not include any educational information about the vaccine, and he had not been given any other materials. (ECF No. 251 at PageID 4717.) The first time Mr. Hibbler saw any written materials about the side effects of the vaccine was when Plaintiffs' counsel had come to the Jail to see him. (Id.) The only materials at the guard station, according to him, are the notices concerning the lawsuit. Mr. Brady echoes this. In his most recent inspection, Mr. Brady likewise observed that "vaccine education materials [are not] readily accessible to inmates." (ECF No. 257-1 at PageID 5019.) He also "did not witness any new inmates getting Covid-19 education materials[.]" (Id. at PageID 5036.)[14]

Regarding the Obama and Ad Council Videos, Chief Fields testified that they are shown twice daily through the entire jail facility and that a detainee can hear the video in his cell. (ECF No. 251 at PageID 4554.) However, Mr. Hibbler testified that the educational videos about the vaccine only play at 3:00 p.m., and that detainees are not always out of their cells at that time and are unable to see the television. He further stated that neither video discusses any particular vaccine or possible side effects of the vaccine.

Chief Fields also testified that in-person education opportunities such as town halls, a pep rally, and chances to speak with medical staff to ask questions, are available to detainees. The pep rally was made available to detainees from "program pods," which Chief Fields explained

[13] It is not clear if Mr. Hibbler misspoke when he referred to April or May of last year, instead of this year, as the Court is not aware of a vaccine being offered or available in April or May of 2020.

[14] In his most recent Report, Mr. Brady also states that he has offered to assist with developing culturally competent education materials and to donate his time to conduct small group vaccine education sessions with inmates. To date, his offers have been rejected. (ECF No. 257-1 at PageID 5045.)

are throughout the facility and were chosen "[b]ecause of the peer influence." He testified that about 300 detainees attended and that doctors were there to "answer questions that the inmates may have had in regard to the vaccination." (ECF No. 251 at PageID 4549, 4550.)

As to other methods of transmitting educational information, Chief Fields testified that information about the vaccines are on the kiosks, played over the phone systems and in general announcements over the PA system. (ECF No. 251 at PageID 4538.) Regarding the kiosks, Chief Fields testified that information about the vaccine "automatically comes up," when a person logs in, and that "they have to acknowledge that they've read or they've seen that material." (ECF No. 251 at PageID 4545-46.)

Plaintiffs challenge the veracity, availability and/or efficacy of each of these.

To begin, town halls have not been held in every housing pod, which Defendants concede. As for the pep rallies, Mr. Hibbler testified that he had not been to one and was unfamiliar with it. (ECF No. 251 at 4723-24.) As for opportunities to speak to medical staff, Mr. Hibbler testified that when he asked a nurse about the vaccine, she responded "you've got to put in sick call to get it." (ECF No. 251 at PageID 4732.) More alarming, Mr. Hibbler testified that other, non-medical, jail staff, have told detainees that the vaccine is "trying to kill us." (ECF No. 251 at PageID 4722.)

Mr. Hibbler's testimony calls into question the availability and access to in-person education. Only 300 out of between roughly 1900-2000 detainees had the opportunity to attend the pep rally where they were able to speak to medical professionals and ask questions; Mr. Hibbler was not one of them and does not know any attendees. Mr. Hibbler has not been able to attend a town hall where Defendants contend that information is delivered live and in-person about the vaccine. When asked if more incentives would convince him to get vaccinated, Mr.

Hibbler expressed a need to speak to a person, face-to-face: "I would like to have more information about the vaccine and the side effects because I'm scared because I have already had COVID once down here." (ECF No. 251 at PageID 4728.)

With his testimony, Mr. Hibbler unknowingly echoed Dr. Bertozzi's testimony regarding the importance of providing opportunities for detainees to connect with people they can trust to discuss and learn about the vaccine:

> [T]he most important part is the ability to engage in dialogue with trusted interlocutors about vaccination. There's a portion of the population that on the basis of just seeing educational materials will accept vaccination. But there are many people for whom that is not sufficient and who need to have an opportunity to ask questions, to have their questions responded to and to believe that they're receiving information from a trusted source. And so we found that providing those opportunities can dramatically increase acceptance of vaccination.

(ECF No. 251 at PageID 4620.)[15]

As for the ability to view materials supposedly posted in the housing units and the requirement to click through certain information on kiosks before one can use them, Mr. Hibbler's testimony disputes these points. Mr. Hibbler explained that, owing to the pandemic and short staffing, detainees are not allowed out of their cells more than one hour per day. It is during this hour that they can take a shower, use the phone, watch tv, or use the kiosk, where Defendants assert that educational materials about the vaccine must be viewed and

[15] In Mr. Brady's most recent Report, he states that approximately 25% of the population at the Jail has severe mental illness ("SMI"), and that this population has had the opportunity to receive information on the vaccine in face-to-face settings with medical personnel. In those interactions, medical personnel have "explain[ed] what is being offered, address[ed] [the SMI detainees'] fears, and explain[ed] the benefits of getting a vaccination." (ECF No. 257-1 at PageID 5001.) According to Mr. Brady, the vaccine education process for this population is ADA compliant and culturally competent. While Mr. Brady does not include information about the vaccination rate of this group, as he presumably does not have this information, one wonders why the Jail has not decided to offer these opportunities to all detainees.

acknowledged before detainees can proceed to using the kiosk for other functions, such as placing a sick call, checking commissary accounts, placing commissary orders, and reviewing the inmate handbook. However, Mr. Hibbler testified that, in his housing unit, they have not always had that hour outside their cells, preventing detainees from seeing any materials or using the kiosk.[16] Moreover, Mr. Hibbler testified that he has not seen information "pop up" on the kiosk automatically, as asserted by Defendants; rather, in his experience, a kiosk-user has to search for materials on the vaccine. Even then, Mr. Hibbler has been in pods where the kiosk was not working. He otherwise testified that he has never heard an audio message about the vaccine over the PA system.

The other detainee-witnesses further eroded Defendants' contention that the kiosk is a way to gain information. Richard Wright testified that to ask a nurse or medical professional a question, you need to enter the question in the kiosk and wait for their response. In his case, and the case of multiple fellow detainees, they, alarmingly, have never been able to ascertain which vaccine they received. He testified that he wanted to know if he had received the Pfizer vaccine and thus needed a second dose. He entered his question for the medical staff into the kiosk but has never received any response. (ECF No. 251 at PageID 4742.) Ronnie Woods, detained in a different location from Mr. Wright, testified that there are two kiosks in his pod, one for commissary and the other for sick call and counselor call. Mr. Woods testified that the kiosk for

[16] On rebuttal, Defendants sought generally to challenge Mr. Hibbler's credibility. Specifically, Chief Fields testified that Mr. Hibbler's housing unit had been let out between 5 and 6 hours on Thursday evening, the night before the first day of the hearing, which contradicted Mr. Hibbler's testimony that his housing unit had not always been able to get their hour of recreation time recently. Specifically, Mr. Hibbler was asked "[r]ecently, have you always gotten that one hour of rec time?" Mr. Hibbler responded that they had not, "[b]ecause . . . they do not have enough staff to let us out." (ECF No. 251 at 4716.) The Court does not find that Chief Fields' testimony succeeds in undermining Mr. Hibbler's credibility.

sick call and counselor call does not work and has not worked for a little over a year. (ECF No. 251 at PageID 4734.)[17] Given the technical issue, detainees have to write requests down on a piece of paper, and Mr. Woods testified that it can take weeks to get a response. He further testified that sick calls, which cost $3.00, are not a good way to get immediate treatment, as, again, assistance may be very delayed. Instead, detainees need to get an officer's attention to get immediate help. (ECF No. 251 at PageID 4735.)

Mr. Wright also testified that the reason he decided to get the vaccine was because he spoke to his family and wanted to be able to start working when he left the Jail. As he testified, no Jail-provided educational materials or incentives played a role in his decision. (ECF No. 251 at PageID 4740.)

What the Court can discern from the Parties' evidence is that, while Defendants are making various attempts to educate the detainees about the vaccine, their efforts are not available to all detainees, and beyond this, are not effective.[18] More generally, Mr. Brady testified that during his most recent inspection, conditions have deteriorated to the point where detainees do not want to discuss their vaccine hesitancy because their time out of cell has dropped so

[17] On rebuttal, Chief Fields testified that he went to Mr. Woods' housing unit to inspect the kiosks. He testified that, though one is under repair, there is another kiosk that is currently working. (ECF No. 252 at PageID 4766–67.) Chief Fields did not testify that the working kiosk can be used for sick call and counselor call, however; he only testified that "because one is working, [Mr. Woods] has access to a kiosk[.]" (Id. at PageID 4767.) The Court does not find that this testimony contradicts or undermines Mr. Woods' testimony that he does not have access to a kiosk to place a sick call, which he believes must be done on the broken kiosk.

[18] Defendants do not appear to be tracking who receives a particular educational offering, such as the pep rally, for instance, to see if that opportunity for education correlates to a significant jump in vaccination rates. This begs the question how Defendants are evaluating their efforts.

dramatically.[19] Upon the Court's own review, the AMEND materials, whether proposed by Plaintiffs or not, are lengthy, dense, and in small print. The Court does not find it likely that such materials will be helpful to a population whose average reading level is at a 6th grade level. (See ECF No. 257-1 at PageID 5000.) The other materials have not been seen by all detainees, and events are not attended by all, as evidenced by Plaintiffs' detainee-witness' testimony. The videos do not answer questions about the vaccines or discuss side effects. The material that supposedly pops up on the kiosk does not do so on every kiosk, and not all kiosks are operable. Simply put, Defendants have not adduced evidence that all detainees detained at the Jail for a period of more than 14 days are receiving educational materials that adequately educate them about the vaccine.

III. Provision of Non-Punitive Incentives to Take the Vaccine

Defendants are similarly emphatic that they have offered a coterie of incentives to detainees to take the vaccine, including $20 in their commissary, fresh fruit, a certificate (styled as an award), entry into a City of Memphis sweepstakes to win a car, and, most recently, a pizza party for the housing pod that has the highest number of vaccine recipients by a certain date. Defendants contend, more or less, that beyond paying detainees to take the vaccine, there is not much more they can be expected to offer. Plaintiffs contest the provision of the incentives, citing detainee testimony that they have not received this or that incentive, or that they are unaware of

[19] During his most recent inspection, Mr. Brady's escort Captain Harris confirmed that detainees are not getting out-of-cell time because of staff shortages, which Mr. Brady believes is at a "crisis level." (ECF No. 251 at PageID 4642; (ECF No. 257-1 at PageID 5018 ("On August 5, 2021, I observed at least half of the Housing Pods locked down because of staffing shortages and additional Housing Pods locked down because of Covid-19 exposure.").) He explains that with no out-of-cell time, detainees do not have access to kiosks and educational materials and cannot put in sick calls. Moreover, Mr. Brady observed that the detainees' mood is "completely hostile," to the point that they are not receptive to education about the vaccine. (Id.)

certain incentives being offered consistently, or at all. According to Plaintiffs, the inconsistent offerings defeat their purpose.

Defendants offered into evidence a notification about the vaccine being free that also details a number of incentives that will be offered, including, no punitive action, fresh fruit on the day of or day after one's vaccination, free access to follow-up medical care, (Ex. 4, ECF No. 245-4); a 4-page document detailing the $20 commissary incentive, beginning with June 1-30, continued through July and August (Ex. 16, ECF No. 245-10); a certification of appreciation (Ex. 17; ECF No. 245-15); a notice about a $100 vaccination drawing, stating that three names will be drawn (Ex. 18; ECF No. 245-11); a notice repeating the $20 incentive as extended through August 31 and an announcement of a pizza party "for the housing unit with the highest vaccination rate" (Ex. 19; ECF No. 245-12)

When asked how he heard about the $20 incentive, Mr. Hibbler stated that he first heard a message over the intercom system about a $20 incentive to take the vaccine on July 14, 2021. (ECF No. 251 at PageID 4724-25.) Otherwise, he testified that a few guards had mentioned it to him, but he doubted the truthfulness of those comments, because the officers sometimes joke or tease the detainees. (ECF No. 251 at PageID 4725.) He did not testify to having seen any printed notices about the incentive. He also testified that he only just heard of a few detainees in his pod receiving their $20, just prior to the August 6 hearing, and he knew of one detainee receiving an orange. (Id. at PageID 4725-26.) Mr. Hibbler testified that he knew of two detainees who were attempting to check whether they had received the $20 in their commissary account, and that one had, but one had not. He testified that this was confusing to him, since they had both received the vaccine. This testimony is consistent with testimony by Chief Fields

acknowledging that there have been delays in depositing the funds into detainee accounts. (ECF No. 251 at PageID 4594-96; ECF No. 252 at PageID 4810.)[20]

As to the certificates of appreciation being awarded to vaccine recipients, Mr. Hibbler testified that he is not aware of anyone receiving that award. When asked if the news of a pizza party being awarded to the pod with the highest number of vaccine recipients would motivate him to get the vaccine, Mr. Hibbler replied, as addressed supra, that it would not, because he wanted "more information about the vaccine and the side effects because I'm scared[.]" (ECF No. 251 at PageID 4728.)

As for post-vaccine care, Mr. Wright testified that he was never informed that he would receive such care, and that despite experiencing side effects, he never received any care. (ECF No. 251 at PageID 4742-43.) Mr. Wright also stated that he knew of other detainees who experienced side effects post-vaccine, who also did not receive any medical treatment or any medication. (ECF No. 251 at PageID 4743.)

Here, again, the Court finds that Plaintiffs have created disputes about whether incentives have been offered to every detainee who has been housed at the Jail for more than 14 days. In the absence of clear records, the picture that emerges is one of a lack of consistency. Simply put, Paragraph 28(b) demands more for termination to be triggered.

[20] A question was raised as to whether Defendants produced all the records demonstrating that payments had gone to 600 or so detainees who have purportedly been vaccinated. (ECF No. 251 at PageID 4594–96.) The records that appear to have been provided covered approximately 215 $20 payments. Regardless, the Court finds that Defendants have not adduced evidence that every detainee who received the vaccine, and was still housed at the Jail, received $20 in commissary funds. Plaintiffs have sufficiently established that a dispute exists on this point.

CONCLUSION

The thrust of Defendants' Motion, and their arguments to the Court on multiple occasions, is that they have checked the boxes of Paragraph 28(b) and have thus terminated the Decree. This posture is concerning. The Consent Decree concerns the safety of detained persons, whose guilt or innocence has not yet been determined, in the midst of a global pandemic. By design, prison detainees live in a congregate living setting with little control over their daily lives, including their personal safety. As Defendants correctly point out, the control that Plaintiffs and other detainees can exercise is electing to get vaccinated. However, as Defendants have learned, this is anything but a straightforward decision. The estimated vaccination rate at the Jail, in the midst of the virulent Delta variant, signals a population in deep peril. The Consent Decree did not enshrine mere box-checking. It enshrined meaningful protection for Plaintiffs, a medically vulnerable group.

On the evidence before the Court, Defendants have failed to satisfy their burden that the Consent Decree has been terminated. Thus, their Motion to Terminate the Consent Decree is **DENIED.**

IT IS SO ORDERED, this 30th day of August, 2021.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE