UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Western Division

ROSIE D., et al.,	)	
Plaintiffs,	)	
v.	)	
CHARLES BAKER, et al.,	)	C.A. No. 01-30199-MAP
Defendants.	)	

PLAINTIFFS' MOTION TO APPROVE AND ORDER DISENGAGEMENT MEASURES, ACTIONS TO IMPROVE ACCESS TO REMEDIAL SERVICES, AND PROVISIONS ON OUTPATIENT SERVICES

I. Introduction

The defendants have consistently failed to provide remedial services in a timely manner as required by federal law and the State's own access standards, as well as to provide those services, and particularly the critical service of care coordination, consistent with the Judgment. The defendants have also failed to meet their own, agreed-to Disengagement Measures for satisfying the Judgment, as well as to satisfactorily implement their own, agreed-to criteria for improving care coordination delivered by outpatient therapists. Despite considerable patience and prodding by the Court, and an initial reluctance to approve and order these Disengagement Measures and Provisions on Outpatient Services, *see* Doc. 815, compliance has not improved, performance has actually deteriorated, and children and youth continue to be denied the benefits of the Judgment and their rights under the Medicaid Act. It is now time for the Court to ensure that its Judgment is satisfied.

At the Court's direction, the plaintiffs are filing a consolidated, renewed Motion to Approve and Order Disengagement Measures, Actions to Improve Access to Remedial Services, and Provisions on Outpatient Services. *See* Doc. 844.[1] The Court has the authority to approve and order these provisions to clarify and ensure compliance with its Judgment.[2] It should approve and order: (1) the agreed-to Disengagement Measures, attached as Ex. 1, to specify the more tailored criteria for satisfying its Judgment; (2) the Actions to Improve Access, attached as Ex. 2, to facilitate compliance with the Disengagement Measures on access; and (3) the Provisions on Outpatient Services, attached as Ex. 3, to clarify that the defendants' unilateral decision to provide needed service coordination through outpatient services still must comply with the standards for care coordination set forth in the Judgment.

II. Statement of Facts

A. The Need for Disengagement Measures

The agreed-to Disengagement Measures evolved from a lengthy negotiation process, prompted by the Court's request that the parties develop clear standards for evaluating compliance with the Judgment. The parties first agreed to a more general set of Disengagement Criteria in 2013. While internal evaluations and other reports from the defendants suggested that some of these Criteria had been met, many others remained outstanding. As a result, the parties engaged in another round of negotiations on compliance standards, culminating in the 2016 Disengagement Measures. *See* Pls' Mem. in Support of Disengagement Proposal at 1-7, Doc.

[1] Although the Court's June 14, 2018 Scheduling Order only addressed Disengagement Measures and Outpatient Services, for the Court's convenience, and to consolidate all related motions and issues, the plaintiffs are refiling the Motion to Improve Access to Remedial Services, Doc. 835, which was filed on May 11, 2018 and argued at the hearing on June 13, 2018.

[2] Since the plaintiffs previously filed and briefed these issues as three separate motions, *see* Docs. 776 (Disengagement Measures), 777 (Outpatient Services), and 835 (Access Actions), this Motion will only summarize the facts and arguments in support of each prior motion. This Motion incorporates by reference the full statement of facts and arguments set forth in their supporting memoranda for each motion. *See* Docs. 762 and 768 (Disengagement Measures), 777 and 778 (Outpatient Services), and 836 (Access Actions).

762. They agreed upon percentage improvement requirements for five of the six Disengagement Measures. The Court resolved the one outstanding Measure – timely access to Intensive Care Coordination (ICC) and In-Home Therapy (IHT) – by adopting a compromise requirement (7.5%) for 2017 and reserving judgment on the requirement for 2018.

The defendants did not comply with any of the 2017 requirements for any of the Disengagement Measures. On Disengagement Measure 1(a), concerning timely access to ICC and IHT, the State's performance for calendar year 2017 fell well short of the benchmarks established by the Court. Only 58.7% of youth and families received an initial appointment with ICC within 14 days; and only 49.7% of youth and families were offered an initial IHT appointment within 14 days. On Disengagement Measure 2, concerning the provision of IHT services, the State only met three of the five benchmarks agreed to by the parties. The 2017-2018 MPR scores for assessment (Area 1) and service planning (Area 2) fell below the incremental improvement standard. On Disengagement Measure 4, concerning the provision of ICC services, the State only met one of the five benchmarks agreed to by the parties. The 2017-2018 MPR scores for assessment (Area 1), service planning (Area 2), team participation (Area 6), and service coordination (Area 7) all fell below the incremental improvement standard. And MPR reports for both IHT and ICC included numerous instances in which practice was considered to be adverse to the youth and family. As a result, children and youth wait months for remedial services, suffer ongoing harm from the lack of prompt and effective treatment for their conditions, and are deprived of the benefits of the Judgment, years after the Court's order.

Families know what it means to wait. PPAL receives hundreds of calls annually from families complaining about long waiting lists for key remedial services, including ICC and IHT. *See* Affidavit of Lisa Lambert, ¶7, attached as Ex. 4. Strikingly, PPAL also receives calls from

providers concerned that they have to turn families away or explain to them about waiting lists. *Id*. For families in crisis, or those who have urgent need for services, waiting a month for help is untenable. *Id.* at ¶¶8, 12-15. They understandably fear for their children and worry about further harm from acute or untreated conditions. *Id.* at ¶¶7-8, 13, 15, 20-21. Given the complexities of the children's mental health system, particularly for families with little experience in navigating state agencies, being placed on a wait list often means not merely a delay in care but a denial of care because many families become lost in the system or experience other adverse outcomes while they wait. *Id.* at ¶¶5, 11-13. And they are rarely informed about access standards or Medicaid requirements like prompt treatment. *Id.* at ¶11. Instead, preferences for culturally or linguistically appropriate services are labeled as a choice to wait for a preferred provider, even though these elements are critical to families' participation in treatment. *Id*. And since ICC and IHT are a gateway to other remedial services, like In-Home Behavior Therapy, waiting for these hub services means even further delays in receiving specialized treatment for challenging behaviors. *Id.* at ¶14. "When waiting becomes the norm for youth and families across the state, the entire system loses credibility and families lose hope that services will be there when they need it most." *Id.* at ¶12.

The fundamental purposes of these Disengagement Measures are to significantly narrow and focus the defendants' obligations under the Judgment; to provide objective and clear standards for evaluating compliance with the Judgment; and to establish a realistic and accelerated timelines for achieving compliance with the Judgment. Those goals have been thwarted, or at least not achieved, but remain critical to remedy the violations of the federal rights of children and youth with SED which were found by the Court in 2006, and which remain today.

B. The Need for Actions to Improve Access to Remedial Services

The plaintiffs understood and anticipated several of the actions necessary to promote timely access to remedial services, and achieve the percentage improvement access standards for ICC and IHT incorporated in the Disengagement Measures. In fact, several of these actions, such as special requirements when waiting times for ICC consistently exceeded thirty days, were incorporated in the plaintiffs' proposed Disengagement Measures. *See* Pls' Revised Disengagement Measures at 1 (Sec. I.A(1)(a), January 6, 2017 (Doc. 768-1)). Ultimately, at the defendants' insistence, and in order to reach agreement, the plaintiffs omitted these actions from the final Disengagement Measures submitted to the Court on February 13, 2017. *See* Doc. 776-1. That decision proved to be unfortunate. Not surprisingly, there continues to be a significant number of ICC, IHT, and other remedial service providers with wait lists consistently in excess of thirty days. In fact, many of the proposed Actions to Improve Access to Remedial Services are specifically designed to reduce wait lists, increase provider capacity, and recruit and retain professional staff at provider agencies.

As noted in the plaintiffs' recent Memorandum to Improve Access to Remedial Services (Doc. 836), the Commonwealth's March 2018 service report indicates that 126 of 161 IHT providers have 5% or less unused capacity, with the vast percentage – well over 100 – having zero (0%) availability. As a result, over 550 children and youth were waiting for the first available IHT provider in March – and another 580 were waiting for the provider of their choice. *Id.* at 3 and Ex. 1. Over 40% of those waiting for IHT services waited over two months, and another 20% waited over a month. *Id.* Similar capacity limitations, resulting in long waiting lists, plague other remedial services. *Id.* at 7-8. Few CSA providers regularly meet the 14 day access standard for ICC. These violations of federal law, as well as of the Judgment, have

persisted despite constant oversight and considerable restraint by the Court. Absent clear requirements to take concrete actions – many of which, like the Alternative Payment Methodology for ICC providers and rate increases for IHT providers, the defendants have acknowledged would be helpful in reducing waiting lists and in promoting more timely access to services – there is little likelihood that this persistent problem will be resolved. And a failure to address the access problem means, quite simply, the Judgment will never be satisfied.

The organizations, professionals, and other staff directly responsible for providing remedial services share a unique perspective on both what causes the long delays in receiving services and what actions are needed to cure these deficiencies. The Association of Behavioral Health providers (ABH) has studied this problem, has advocated for solutions, and has suffered the consequences of inaction for years. *See* Affidavit of Vicker DiGravio at ¶¶3-5, attached as Ex. 5. Their perspective about the problem and the cure is consistent and clear – disincentives to providing timely care must be eliminated and focused actions to retain staff and ensure access must be undertaken. *Id.* at ¶¶6-12, 15. For ICC, implementing a daily payment rate, based upon the demonstrated success of an Alternative Payment Methodology pilot, is critical and should not be further delayed or diluted. *Id.* at ¶¶6-7. Conducting the long overdue comprehensive rate studies for the other remedial services and implementing its results is essential. *Id.* at ¶¶9-12. For both of these actions, a court order is necessary. *Id.* at ¶¶7, 12.

C. The Need for Outpatient Therapy Requirements

Like certain actions to improve timely access, the plaintiffs' proposed Disengagement Measures included a list of provisions on service coordination provided by outpatient therapists. *See* Exhibit A, Doc. 768-1 and 368-2. And like access actions, the defendants insisted, as a condition of their agreement to the Disengagement Measures, that the outpatient provisions be

deleted. And like the result of omitting the access actions, deleting the outpatient provisions proved to be unfortunate. While the defendants have implemented some billing changes to Outpatient Therapy, there has been no systemic effort to monitor, let alone improve, the service coordination provided by outpatient therapists. Nor is there systemic evidence or data demonstrating that these billing modifications have resulted in better service coordination by outpatient providers. Tens of thousands of SED children and youth receive their service coordination from outpatient providers. The defendants' unilateral decision to use Outpatient Therapy as a mandatory referral source for several remedial services (like Therapeutic Mentoring), and the defendants' expectation that outpatient therapists would provide adequate care coordination to children with SED, makes some modifications to outpatient services critical if the promise of the Judgment is ever to be realized. *See* Pls. Motion to Modify the Judgment to Incorporate Provisions on Outpatient Therapy at 3-5 (Doc. 777).

Families and providers know first-hand the limitations of the current outpatient system for SED youth. *See* Lambert Aff. at ¶¶10, 14; DiGravio Aff. at ¶¶13-16. Outpatient Therapy was never designed to be a key remedial service, but the Commonwealth chose to mandate that it serve as a gateway to other remedial services for tens of thousands of youth and families, and provide all necessary care coordination function to children and youth served by multiple providers or state agencies. DiGravio Aff. at ¶¶ 13-14. It adopted practice Guidelines that described these new expectations and set new performance standards. *Id.* at ¶14. While MassHealth eventually agreed to remove some payment restrictions and allow payment for certain mandated service coordination activities, considerable obstacles remain to achieving compliance with the Outpatient Guidelines. *Id.* at ¶15-16. Youth receiving Outpatient Therapy will not have access to adequate care coordination, unless the Court requires the defendants to

comply with the service coordination standards in the Judgment. Id. at ¶17. Otherwise, regardless of whether that coordination is provided through ICC, IHT, or outpatient services, children and youth with SED will be left, as before, with no one to effectively coordinate and monitor their treatment.

III. The Court Has the Authority to Interpret, Modify, and Enforce Its Judgment.

A. The Court Has the Inherent Authority to Interpret Its Judgment.

Federal courts have broad equitable authority to clarify or interpret their own orders, even when those orders are entered with the consent of the parties. *In re Pearson,* 990 F.2d 653 (1st Cir. 1993). As the First Circuit made clear in *Pearson*, recognizing the unique aspects of structural injunctions:

> Rather, when, as now, an injunction entered pursuant to a consent decree has ongoing effects, the issuing court retains authority to enforce it. *See, e.g., System Fed'n No. 91, Etc. v. Wright,* 364 U.S. 642, 647, 81 S.Ct. 368, 371, 5 L.Ed.2d 349 (1961) (explaining that structural injunctions "often require[ ] continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained th[e] equitable relief"). By the same token, a court retains authority to modify or interpret such decrees in light of changed circumstances. *See, e.g., id.* at 646–47, 81 S.Ct. at 370–71; *United States v. Swift & Co.,* 286 U.S. 106, 114–15, 52 S.Ct. 460, 462–63, 76 L.Ed. 999 (1932). This authority is part of a court's inherent powers and exists regardless of whether a particular consent decree expressly so provides. *See Swift,* 286 U.S. at 114, 52 S.Ct. at 462.

Id. at 657.

A federal court's equitable powers include, in order of intrusiveness: interpreting the agreement or order; issuing further injunctions to implement an agreement or order; granting supplemental relief, consistent with the purpose of the agreement or order; holding a party in contempt; appointing a special master; and appointing a receiver. *See* Anderson, *Implementation of Consent Decrees in Structural Reform Litigation,* 1986 Univ. Ill. L.R. 725, 738 (1986).

The Court also can order additional injunctive and other relief distinct from that specified in the Judgment, provided that it is necessary to effectuate the Judgment. "On the periphery of a court's power to interpret is also a limited power to issue injunctive relief which may be used to protect rights and enforce duties once they have been clarified." *Brewster*, 675 F.2d 1, 3 (1st Cir. 1982) (citing *Delaware Valley Citizen's Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 974 (3d Cir. 1982) (after finding violation of consent decree, court issues injunction requiring specific implementing action not contained in the decree)). To the extent that the plaintiffs seek, and the Court orders, different or additional relief than that required by the Judgment and Remedial Plan, the relief must be narrowly tailored to achieve the goals and purposes of the order. *Brewster v. Dukakis*, 687 F.2d 488, 495, 500 (1st Cir. 1982)(decree had deinstitutionalization as its goal and the order in question pertained to requiring the state to pay for a broad legal services program for the class).

For example, in order to ensure that the requirements of the Judgment and Plan are completed in a timely fashion, the Court can interpret the requirements of its Judgment, establish compliance standards, determine disengagement criteria, extend current deadlines and require a new time line for the completion of outstanding obligations. *Rosie D. v. Patrick,* 474 F. Supp. 2d 238, 240 (D. Mass. 2007); *see also, Brewster v. Dukakis*, 3 F.3d. 488, 489 (1st Cir. 1993)(describing the district court's entrance of an order setting maintenance-of-effort provisions, guiding principles, ranked priorities, and actions steps needed to achieve compliance and "end its jurisdiction.")

B. The Court Has the Authority Under Both the Judgment and Rule 60(b)(5) to Modify Its Terms.

The Court's Judgment, and explanatory opinion, provide that it may modify its Judgment for good cause. *See* Judgment, ¶ 50, and *Rosie D.,* 474 F. Supp. 2d at 240. This good cause standard may be more flexible than the formal requirements of Fed. R. Civ. Pro. 60(b)(5). [3]

Federal Rules of Civil Procedure 60(b)(5) permits a party to obtain relief from a judgment or order if "applying it prospectively is no longer equitable." The party seeking relief from, or modification of a judgment or order on these grounds bears the initial burden of establishing that a significant change in law or factual circumstances warrants relief. *Rufo v. Inmates of the Suffolk Cnty Jail*, 502 U.S. 367, 383-84 (1992). If this initial burden is met, the Court must then consider whether the proposed modification is "tailored to resolve the problems created by the change in circumstances." *Rufo,* 502 U.S. *at* 391; s*ee also*, *King v. Greenblatt*, 149 F.3d 9, 21-22 (1st Cir. 1998) (concluding evidence of a significant change in philosophical approach to treatment of, and conditions of confinement for, sexually dangerous persons amounts to the significant change in facts required by *Rufo*); *United States v. City of Portsmouth, N.H*., 2013 WL 595929 *4 (D.N.H. Feb. 15, 2013) (concluding that environmental interests, paired with unforeseen volume of rock and budgetary constraints made modification of schedule for sewer upgrade project appropriate).

In 2009, the Supreme Court affirmed the *Rufo* standard for equitable relief in *Horne v. Flores*, describing the relevant inquiry as "whether 'a significant change either in factual conditions or in law' renders continued enforcement of the judgment 'detrimental to the public

[3] As the Court may well remember, the defendants proposed that the Judgment allow them to unilaterally modify its terms, in their sole discretion, as circumstances required. The Court rejected that portion of their proposal and imposed its own standard – either agreed to by the parties or as determined by the Court, based upon a showing of good cause. *Id.* In this key respect, modification under the Judgment is not equivalent to modification under the Federal. Rules of Civil Procedure.

interest.'" 557 U.S. 433, 453 (2009) (citing *Rufo,* 502 U.S. at 384). The Court emphasized that district courts must be flexible, and allow modifications based upon a range of changed circumstances, where such revisions will promote compliance with federal law and further the public interest. *Id.* at 450. *See also, Boston Chapter, NAACP, Inc. v. Beecher*, 295 F. Supp. 3d 26, 30 (2018) (ordering modification of consent decree and concluding that "the 'flexible standard' in Rule 60(b) applies to consent decrees.")

C. The Court Has the Inherent Authority to Enforce Its Judgment.

The entry of the Judgment (Doc. 367) and the Remedial Plan (Doc. 367-1 and 367-2) as incorporated in the Court's opinion, *Rosie D. v. Patrick,* 497 F. Supp. 2d 76 (D. Mass. 2007), provide the precondition for the exercise of the Court's equitable authority to enforce them. *See*, *e.g.*, *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 at 385 (1992) (citing *Railway Employees v. Wright*, 464 U.S. 642, 650-51 (1961)); *United States v. Board of Educ. of City of Chicago*, 567 F. Supp. 272, 281 (N.D. Ill. 1983), *aff'd* in part and *rev'd* in part on other grounds, 717 F.2d 378 (7th Cir. 1983), *Brewster v. Dukakis*, 675 at 3-4; *Inmates of Boys' Training School v. Southworth*, 76 F.R.D. 115, 123 (D.R.I. 1977).

Court orders, by their very nature, are enforceable and invest the court with equitable authority to ensure compliance with their terms. *Swann v. Charolette-Meckenberg Bd. of Ed.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies"); *Green v. County School Bd.*, 391 U.S. 430, 439 (1968). Courts have broad remedial powers in the event of noncompliance with their orders. *Milliken v. Bradley*, 433 U.S. 267 (1977); *Missouri v. Jenkins II,* 515 U.S. 70, 88 (1995) (Court's remedial powers are

appropriate provided that they are framed by "the violation, [which] means that federal court decrees must directly address and relate to the constitutional violation itself").

The Court has the authority to order the defendants to take additional or more specific actions necessary to achieve the purposes of its orders and to satisfy their obligations thereunder. When faced with "repetitive failures to comply with orders[,]" a district court is "'justified in entering a comprehensive order to insure against the risk of inadequate compliance.'" *Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000) (quoting *Hutto v. Finney,* 437 U.S. 678, 687 (1978)). The Court may, directly under the terms of the Judgment and Remedial Plan, as well as under its broad equitable authority to enforce its own orders, compel the defendants to do what is reasonably necessary to provide the relief agreed to and ordered by the Court.

In the instant case, in order to effectuate its Judgment, the Court can order the defendants to take additional actions necessary to ensure that class members receive remedial services promptly. It can also order the defendants to ensure that children and youth in Outpatient Therapy are provided with effective service coordination from the program models designated by the defendants as access gateways to other remedial services and mandated by the defendants to provide service coordination for youth receiving services from multiple agencies and providers.

And apart from the Judgment, if the Court now finds current violations of class members' federal legal rights to all necessary EPSDT services, including effective service coordination; home-based remedial services provided with reasonable promptness; and ICC and IHT services provided consistent with Medicaid access standards, it has broad authority to fashion a remedy which will secure these federal rights and provide class members with meaningful relief. *Swann*, 402 U.S. at 15; *Duran v. Carruthers*, 678 F. Supp. 839, 848 (D.N.M. 1988). The Court's authority encompasses relief related to ensuring the State's compliance with federal Medicaid

requirements, access standards, and services necessary to prevent, ameliorate, or treat a condition.

IV. The Court Should Approve and Order the Disengagement Measures.

The Court previously considered, but declined to order, the Disengagement Measures, primarily because it believed the defendants "have already committed themselves to" complying with these Measures. Order re: Plaintiffs' Motion to Approve Joint Disengagement Measures, September 27, 2014 (Doc. 815). The Order, without prejudice, noted that "If developments over the coming months suggest that a formal ruling or amendment to the Judgment is necessary, one or both of the motions may be re-filed. *Id.* at 2. That time is now.

Despite the Court's hope that "a formal order is not necessary to ensure that Defendants will continue vigorous efforts to implement these measures," the evidence now is otherwise. As noted above, the defendants have failed to meet their own, agreed-to numerical standard for virtually every Measure. Moreover, they have continued to disavow any obligation to do so. Tr. at 43:23-44:13, June 13, 2018 Status Conference. They have repeated their insistence that the access requirements are neither binding nor appropriate. It is beyond dispute that absent a court order approving and adopting these Disengagement Measures, they will fade into irrelevance in the same way that the prior Disengagement Criteria have. And absent clear, objective standards for evaluating compliance – which the Court requested, the parties developed, the defendants agreed to, and everyone stated on the record were useful – the Court will be required to assess the Commonwealth's performance against more general and subjective mandates.

The proposed order approving the Disengagement Measures, attached as Ex. 1, includes the precise language agreed to by the parties and submitted to the Court February 13, 2017 (Doc. 776-1), with one exception: the compliance requirement for Disengagement Measure 1 on access

incorporates the plaintiffs' second year standard set forth in the original proposal – 83% of appointments in ICC within 14 days and 68% of appointments in IHT within 14 days – and sets a new compliance date of 2019. *See* Pls.' Mem. in Support of Disengagement Proposal at 11-12 and Ex. 1. Adoption of the originally-proposed access standard is appropriate for two reasons. First, the original goal is still below the well-accepted standard for substantial compliance with a federal decree,[4] and far below what is required for compliance with a promptness standard required by the Medicaid Act. Second, given the adoption and reasonable implementation of the Actions to Improve Timely Access to Remedial Services, as set forth in Ex. 2 and discussed in Section V, *infra,* the original goals are realistic, achievable, and within reach. Extension of the compliance date by one year (to December 31, 2019) is reasonable and probably necessary, in order for the Actions to have their intended impact and to afford the defendants additional time to meet their federal access standard.

As part of the Court's authority to interpret and clarify its Judgment, it plainly can establish compliance criteria for satisfying its Judgment. *Brewster v. Dukakis,* 3 F.3d 488, 489 (1st Cir. 1993); *Johnson v. Sheldon.* 2009 WL 3231226 (M.D. Fla., Sept. 30, 2009) (motion for termination of decree denied, given defendants' failure to achieve exit criteria set forth in the Stipulation and later modified by court order). This is especially true when the defendants have repeatedly claimed certain provisions or terms are vague or ambiguous. Courts are encouraged, particularly in cases involving federal oversight of local governmental functions, to incrementally disengage from active oversight of federal injunctive orders, establish clear criteria

[4] As noted in the Pls.' Mem. in Support of Disengagement Proposal, this standard is still well below what the First Circuit and lower courts traditionally find is necessary to achieve substantial compliance with a remedial order. *See Fortin v. Comm'r of Ma. Dep't of Public Welfare,* 692 F.2d 790, 795 (1st Cir. 1982) (numerical compliance standard should be strictly applied and only very minor deviations should be tolerated in assessing compliance; 90-95% compliance with a numerical standard is reasonable); *Rolland v. Celluci,* 138 F.Supp.2d 110, 117-118 (D. Mass. 2001)(*citing Halderman v. Pennhurst,* 901 F.2d 311, 319 (3rd Cir. 1990)) (numerical standards should be strictly enforced)).

for complete disengagement, and, by narrowing the focus of future compliance activities, facilitate the defendants' substantial compliance with its decrees. *Freeman v. Pitts,* 503 U.S. 467, 489 (1992).

The Court certainly could establish compliance criteria as part of its authority to modify the Judgment for good cause. Since there have been disagreements between the parties as to the status and meaning of compliance, since the Disengagement Measures were negotiated to resolve those disagreements, since the defendants have not adhered to those Disengagement Measures and now challenge their binding effect, there are sufficient changed circumstances to warrant modification. And since they were agreed to, adopting these Disengagement Measures is plainly narrowly tailored to the changed circumstances. Finally, given the undisputed access data that shows many youth and families wait far longer than 14 days for an ICC or IHT appointment, in violation of the Medicaid Act and its EPSDT access standard, the Court clearly can adopt the Disengagement Measures as a supplemental remedial order, based upon a finding of noncompliance with its Judgment.

Moreover, the defendants agreed to all of these Disengagement Measures, with the exception of the precise access numbers. Thus, they constitute carefully negotiated and mutually agreed to exit criteria. *United States v. Tennessee*, 986 F. Supp. 2d 921, 933–37 (W.D. Tenn. 2012). The Court plainly has the authority to adopt these Disengagement Measures as *its* criteria for relinquishing active supervision of its Judgment. Given the defendants' recent repudiation of them as binding requirements, it is imperative that it do so. Tr. at 43:23-44:13, June 13, 2018 Status Conference. As the Supreme Court noted in *Frew v. Hawkins*, 540 U.S. 431, 439 (2004):

> Here ... the order to be enforced is a federal decree entered to implement a federal statute. The decree does implement the Medicaid statute in a highly detailed way, requiring the state officials to take some steps that the statute does not specifically require. The same could be said, however, of any effort to implement the general EPSDT statute in a particular way. The decree reflects a choice among various ways that a State could implement the Medicaid Act. As a result, enforcing the decree vindicates an agreement that the state officials reached to comply with federal law.

V. The Court Should Approve and Enter the Actions to Ensure Timely Access to Remedial Services as a Court Order.

At the June 13, 2018 Status Conference, the plaintiffs explained the necessity for the proposed order. Doc. 835-1; Tr. at 20-24. That order, minus the 2018 access requirements of ICC and IHT which are now incorporated directly into the Order to Adopt Disengagement Measures, *see* Ex. 1, contains the five key Actions which the plaintiffs, providers, professionals, and stakeholders believe are necessary to meaningful address excessive delays in accessing remedial services. *See* Ex. 2. As explained in the Pls' Memorandum to Improve Access, Doc. 836, one Action is designed to increase IHT capacity, one to manage long delays in ICC, one to implement the APM for ICC at the current daily rate, and two to increase rates for other remedial services, pursuant to the State's own regulatory rate process. Since the defendants have made clear that they will not commit to these Actions – even the ones that they have offered to undertake or deemed prudent after studying the results of the payment pilot – the Court should approve and order these Actions.

The Court has the authority to modify its Judgment to include specific actions necessary to achieve its fundamental purpose of providing home-based services promptly. *Rufo*, 502 U.S. at 391. In response to the plaintiffs' 2010 Motion to Ensure Timely Access to Remedial Services

(Doc. 507) and Supplemental Motion (Doc. 542),[5] the defendants established their Medicaid access standard that requires an appointment with an ICC or IHT clinician with 14 days of request. Since the evidence is undisputed that, years later, this standard still has not been met, *see* Sec. II(B), *supra*, there is plainly a changed circumstance warranting modification.[6]

Over the past year, the Court repeatedly asked the defendants to propose actions to improve access, to no avail. There also is evidence that the plaintiffs' proposed Actions to Improve Timely Access to Remedial Services are reasonably calculated and narrowly tailored to promote more prompt access to ICC and IHT, and to address these changed circumstances. *Id.* Ex. 5. Therefore, the Court should modify its Judgment to incorporate these Actions to Improve Timely Access to Remedial Services, as set forth in Ex. 2.

VI. The Court Should Approve and Enter Outpatient Therapy Requirements as a Court Order.

The core purposes and specific provisions of the Judgment are to ensure that timely access to all remedial home-based services, and that adequate service coordination, are provided to all SED children, regardless of the program model used to deliver this critical service. *Rosie D.,* 497 F. Supp. 2d at Ex. A. 11-18. And the Judgment decidedly did not restrict access to all

[5] Re-reading these pleadings is both instructive and frustrating. Eight years ago, in October 2010, the plaintiffs filed their first motion seeking judicial relief for lengthy waiting lists for ICC. The motion was accompanied by a detailed legal memo (Doc. 508) and three supporting affidavits from families, advocates, and class counsel describing the scope and impact of this Medicaid violation. *See* Affidavit of Lisa Lambert (Doc. 508-1), Affidavit of Leslie Lockhart (Doc. 508-2), and Affidavit of Kathryn Rucker (Doc. 508-3). After months of negotiations between the parties, directives from the Court, and evaluations from the Monitor, the lengthy waiting lists remain unchanged. As a result, the plaintiffs filed a supplemental motion (Doc. 542) seeking judicial relief for the Medicaid violations.

[6] *See, e.g., Horne v. Flores*, 557 U.S. 433, 453(2009) (describing the relevant inquiry as "whether 'a significant change either in factual conditions or in law' renders continued enforcement of the judgment 'detrimental to the public interest.'") (citing *Rufo,* 502 U.S. at 384); *King v. Greenblatt*, 149 F.3d 9, 21-22 (1st Cir. 1998) (concluding evidence of a significant change in philosophical approach to treatment of, and conditions of confinement for, sexually dangerous persons amounts to the significant change in facts required by *Rufo*); *United States v. City of Portsmouth, N.H.*, 2013 WL 595929 *4 (D.N.H. Feb. 15, 2013) (concluding that environmental interests, paired with unforeseen volume of rock and budgetary constraints made modification of schedule for sewer upgrade project appropriate).

other remedial services, like In-Home Behavior Services and Therapeutic Mentoring,[7] to participation in ICC, IHT, or Outpatient. *Id.* at 16-18. The defendants' post-judgment decision to create three clinical "hubs" to provide both service coordination and authorization to other home-based services fundamentally altered access to, and delivery of remedial services, representing both a significant change in fact and a major departure from the central purposes of the Judgment. Because Outpatient Therapy is now, and will continue to be, an important part of the Commonwealth's program for providing access to, and coordination of, remedial home-based services, an order establishing certain standards for Outpatient Therapy is necessary to afford the Court clear authority to oversee, monitor, and enforce these standards, which are critical to the implementation of the remedial service program.

Plaintiffs' proposed Order on Outpatient and accompanying Attachment A (Doc. 777-1; Exhibit 3) incorporate into the Court's Remedial Plan a description of the purpose, scope, and responsibilities of Outpatient Therapy, and the agreed upon improvements to that service. Most importantly, the proposed modification includes the principle that when children or youth receive service coordination from Outpatient Therapy, they will receive the same type and quality of service coordination as other children with SED receive from ICC or IHT, perhaps with lesser intensity, but consistent with their needs. *See* Doc. 777-1 Attachment A, ¶ A. This principle of equality extends to the type of service coordination activities, the absence of any limitations on such activities, and the parity in rates paid for therapeutic interventions and care coordination. *Id.,* ¶¶ A, B. It also ensures parity between Managed Care Entities (MCEs) in the way service coordination activities are defined, authorized, reviewed, and reimbursed. *Id.,* ¶ C.

The proposed order incorporates the full range of service coordination responsibilities and activities that the Court's Judgment identified for ICC, and that the defendants' own

[7] The defendants also impose this access restriction on Family Support and Training (Family partners).

Outpatient Guidelines delineate for Outpatient Therapy providers. It also details the steps that the defendants must undertake, in conjunction with their managed care entities, to ensure consistency in the authorization of these activities. Finally, it requires the defendants to reimburse service coordination activities at the same rates as face-to-face therapy, thus communicating the equal value and importance of engaging in these activities.

While the Rule 60(b)(5) standard for modification may be somewhat more rigorous than the good cause standard set forth in the Judgment, the defendants' unilateral determination that Outpatient Therapy was a necessary gateway to other remedial services are clearly unanticipated changes in fact which justify modification of the Judgment to ensure that the basic purpose of the Court's orders is achieved. Given the defendants' actions, and their impact on the Court's directive that all SED need and should be provided effective care coordination, the Court should clarify that its Judgment requires that whatever mechanism or model the defendants' elect to provide care coordination must comply with the basic requirements for effective care coordination. Therefore, the Court should modify its Judgment and incorporate service coordination requirements for Outpatient Therapy, as set forth in Ex. 3.

VII. Conclusion

For the reasons set forth above, as well as those set forth in the respective pleadings and memoranda in support of prior motions, *see* note 2 *infra*, the Court should approve the Disengagement Measures, Actions to Improve Access to Remedial Services, and Provisions on Outpatient Services, and enter the proposed orders set forth in Exs. 1-3 herein.

RESPECTFULLY SUBMITTED,
THE PLAINTIFFS,
BY THEIR ATTORNEYS,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically through the Electronic Case Filing (ECF) system to all counsel of record.

Dated: August 6, 2018 /s/ Steven J. Schwartz