UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROSIE D.*, et al.*, **Plaintiffs,** **v.** **Charles Baker*, et al.*,** **Defendants.**	**CIVIL ACTION NO. 01-30199-MAP**

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

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INTRODUCTION

In their Motion to Approve and Order Disengagement Measures, Actions to Improve Access to Remedial Services, and Provisions on Outpatient Services (the "Motion"), the Plaintiffs have aggregated several distinct requests, but have established an entitlement to none of them. They ask the Court to enter orders "enforcing" the July 16, 2007 judgment in this case (the "Judgment"), without identifying any command of the Judgment that the Defendants have allegedly violated, and without pursuing a finding of contempt—the proper vehicle for such a request. Plaintiffs' Motion also asks the Court to modify the Judgment by adding new requirements under Fed. R. Civ. P. 60(b)(5) and the Judgment's own modification clause, neither of which provides the grounds to expand or supplement the existing Judgment.

Even if the Plaintiffs' Motion were the proper method for pursuing the relief they seek—which it is not—the Plaintiffs have failed to meet their burden of proof to establish that a modification of the Judgment is warranted, or that the measures they propose accomplish their stated goals. Accordingly, this Court should deny the Motion, with prejudice.

BACKGROUND

In its recent Scheduling Order (Docket No. 844, dated June 14, 2018), the Court directed the parties to make specific filings related to the continuation of active oversight and monitoring of this case. *See* Judgment, ¶ 52 (Defendants' reporting requirements "will terminate" five years from entry of the Judgment in 2007). The Defendants filed their "Motion for an Order Regarding Substantial Compliance and to Terminate Monitoring and Court Supervision," on August 6, 2018. *See* Docket No. 848. In this filing, the Defendants reiterated the evidentiary basis for their contention—which they have advanced since 2012—that they have substantially complied with all the requirements of the Judgment, and that the Court should therefore bring monitoring and active judicial oversight to an end.

Simultaneously, the Plaintiffs, at the Court's invitation, revived requests from two prior motions previously opposed by the Defendants and denied by the Court without prejudice. *See* Docket No. 815. *See also* Docket No. 776 (a motion to modify the Judgment to include the Disengagement Criteria, filed on February 16, 2017) & Docket No. 777 (a motion to modify the Judgment to add certain compulsory actions the Defendants must take with regard to certain outpatient behavioral health services, filed on February 17, 2017). Via their instant Motion, the Plaintiffs renew their prior requests that the Court enlarge the Defendants' duties under the Judgment. They have also renewed their request (made originally in Docket No. 835, filed on May 11, 2018) that the Court order the Defendants to take certain highly specific actions—including but not limited to changing the Medicaid payment methodology for Intensive Care Coordination ("ICC") and increasing the rates paid to providers of In-Home Therapy ("IHT").

ARGUMENT

As set forth below, the Plaintiffs' Motion references no substantive provision of the Judgment with which the Defendants have allegedly failed to comply. The Plaintiffs' Motion instead relies exclusively on the Defendants' performance with regard to the Disengagement Measures, a set of actions and targets that Defendants never agreed would be the measure of compliance with the Judgment and, in part, which the Defendants never agreed to at all. Yet, Plaintiffs' Motion argues: (a) that the Disengagement Measures themselves are embedded in, or comprise terms of, the Judgment; (b) that the Defendants have not attained certain of the numerical targets set forth in the Disengagement Measures; and (c) that failure to attain any of the Disengagement Measures therefore serves as grounds to add new substantive requirements to the Judgment. If this is indeed the Plaintiffs' assertion, it is untenable. If the Disengagement Measures were already a part of the Judgment, then their Motion to modify the

Judgment is both unnecessary and moot. And if attainment of the Disengagement Measures is not a part of the Judgment, then the Plaintiffs are impermissibly asking the Court to modify a Judgment with which the Defendants have already complied. Under either scenario, the Plaintiffs are asking the Court for relief it simply cannot grant.

I. The Court Lacks Authority to Enter the Orders to "Enforce" the Judgment Because Plaintiffs Have Not Shown that the Defendants Have Failed to Comply With the Judgment.

The Plaintiffs seek relief, in part, based on their contention that the Defendants have failed to comply with the Judgment, and, therefore, that additional judicial strictures are necessary to compel such compliance. Plaintiffs' argument appears to rest on the notion that the Defendants cannot establish compliance with the Judgment unless they also meet targets set forth in the Disengagement Measures. Therefore, Plaintiffs request that the Court "enforce" the Judgment by modifying it to include those targets and myriad other requirements related to ICC, IHT, and certain other behavioral health services that were not included in the Judgment at all. For the reasons set forth below, Plaintiffs' Motion is conceptually flawed, legally improper, and factually unfounded.

A. A Party Seeking to Enforce a Judgment Must Bring a Petition for Civil Contempt and Prove By Clear and Convincing Evidence that the Defendant Has Failed to Comply With a Material Term of the Judgment.

As a threshold matter, the Plaintiffs' Motion is not an appropriate vehicle for a request to "enforce" the Judgment. As the First Circuit has repeatedly observed, where a plaintiff contends that a governmental defendant has failed to comply with a court-ordered remedial decree, "an action for enforcement (i.e., contempt)" is the proper way to seek enforcement of the judgment. *Brewster v. Dukakis*, 675 F.2d 1, 3 (1st Cir. 1982). *See also Hawkins v. Department of Health & Human Services for New Hampshire*, 665 F.3d 25, 30-31 (1st Cir. 2012) (District Court did not err in holding that enforcement of consent decree enumerating

defendant's obligations under EPSDT statute could only be sought by motion for contempt). A district court has "no free-standing ancillary jurisdiction to enforce consent decrees," but instead is "constrained by the terms of the decree and related order."[1] *Ricci v. Patrick*, 544 F.3d 8, 22 (1st Cir. 2008) (internal quotations omitted). The *Ricci* court went on to hold that, even to issue orders *enforcing* its own remedial order, a district court must first determine that the defendant has failed to comply with a material requirement of the judgment, or that a federal-law violation identified in the original judgment remains ongoing. 544 F.3d at 22 (court has 'inherent authority' to enforce its own underlying order, "but only where the order itself is violated"). *See also, Frew ex rel. Frew v.* Hawkins, 540 U.S. 431, 442 (2004) ("federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials").

The only appropriate forum for entry of additional orders to enforce a judgment or decree is a petition for civil contempt. And in such a proceeding, the movant must demonstrate, among other things, that the "'order was clear and unambiguous,' the alleged contemnor 'had the ability to comply with the order,' and 'the alleged contemnor violated the order.'" *Hawkins*, 665 F.3d at 31 (quoting *United States v. Saccoccia*, 433 F.3d 19, 27 (1st Cir. 2005) (internal numbering omitted)). The movant must prove the defendant's failure to comply with the order or judgment "with clear and convincing evidence." *Hawkins* 665 F.3d at 31-32.

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[1] The Supreme Court has confirmed that the same standard governs a court's authority to enforce its own judgment, whether that judgment was attained pursuant to a consent decree or a litigated result. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

The Plaintiffs have brought no such motion here, nor have they done so during the 11 years that the Judgment has been in effect. Nor do they identify any provision, paragraph, or affirmative command of the Judgment with which the Defendants have failed to comply. *See generally* P's Mem. Simply, the Plaintiffs point to no language *in the Judgment itself* that the Defendants are alleged to have violated, nor can they. They have not, and cannot, make out even a *prima facie* case for civil contempt, which is the appropriate standard for evaluating their request to enter orders to enforce the Judgment.

The Plaintiffs concede that, whatever form their motion may take, they have the burden of showing that the Defendants are not in substantial compliance with the Judgment. *See* P's Mem. p. 10. Notwithstanding that acknowledgment, at only one point in their 20-page memorandum do the Plaintiffs even mention a specific provision of the Judgment, and that provision (paragraph 50) concerns *modification*, not one of the Judgment's substantive requirements. The Plaintiffs' Motion therefore lacks any basis on which the Court could find that the Defendants have not complied with the Judgment.

Without an evidentiary proffer showing Defendants' non-compliance with the Judgment's actual substantive terms, the Plaintiffs cannot sustain their burden of proof. Thus, Plaintiffs' Motion should be denied.

B. The Plaintiffs' Reliance on Certain Disengagement Measures as a Basis for Requesting Enforcement Orders is Misplaced.

Rather than present this Court with clear and convincing evidence of Defendants' non-compliance with the Judgment, Plaintiffs' Motion instead tries to focus the Court on Defendants' achievement of certain Disengagement Measures. To justify their focus on certain Disengagement Measures instead of the Judgment, the Plaintiffs construct a three-part, circular strawman. First, Plaintiffs imply that the Disengagement Measures are effectively part of the

Judgment already because the Defendants "agreed to" them. *See* P's Mem. p. 1. Second, they contend that the Defendants' failure to achieve certain of the Disengagement Measures equates to non-compliance with the Judgment. Finally, they close the circle by urging this Court to rectify Defendants' purported non-compliance by modifying the Judgment to explicitly incorporate the Disengagement Measures and various other requirements. As explained below, the Court should reject Plaintiffs' circular argument as it is neither legally sound nor factually supported.

1. Failure to "Comply" with Certain Disengagement Measures is Not Grounds for a Finding of Non-Compliance with the Judgment.

The initial fallacy in the Plaintiffs' argument is their portrayal of the Disengagement Measures as part of the Judgment. They are not. As the Court well recalls, the disengagement process began over six years ago, in 2012. At that point, the Judgment required that judicial monitoring end, *see* Judgment, ¶ 52 (reporting requirements "will terminate" five years from entry of Judgment), and Defendants made their filing demonstrating substantial compliance. Following that filing, the Court directed the parties to meet and confer and, if possible, reach agreement on steps that Defendants would take to achieve Plaintiffs' agreement to end court monitoring.[2] In 2016, after four years of efforts—and completion of all the tasks contemplated by the initial disengagement process—Plaintiffs did not agree to the end of court monitoring. Thus, in the summer of 2016, the Court again directed the parties to meet and confer and, if possible, reach a *new* agreement on what an end to court monitoring would entail. Once again,

[2] The Defendants have maintained, since 2012, that they are in substantial compliance with the Judgment and that monitoring should end. Nevertheless, the Court has been reluctant to end monitoring without the Plaintiffs' agreement that an end to monitoring was appropriate. Therefore, at its core, the disengagement exercise has always been about achieving Plaintiffs' agreement to end court monitoring.

as directed, the Defendants participated in such discussions and, this time, agreed to make efforts to achieve certain numeric targets[3] and implement certain changes in the delivery of and payment for certain non-remedy outpatient behavioral health services.

Despite participating, at the Court's direction, in the discussions related to disengagement, at all times during the past six years the Defendants have continuously maintained that they are in substantial compliance with the Judgment and that they have undertaken the disengagement steps voluntarily (i.e., not because such steps were mandated by the Judgment) in an effort to achieve Plaintiffs' agreement to end court monitoring without the need for motion practice. At no time have Defendants agreed or conceded that the disengagement process or any activities undertaken as part of that process were a measure of compliance with the Judgment.

Furthermore, at no point during the disengagement process did the Court make the Disengagement Measures part of the Judgment. Nor did the Defendants agree to them being incorporated into it. *See* Docket No. 782 (Defendants' opposition to Plaintiffs' motion to incorporate Disengagement Measures as order of the Court). *See also* Docket No. 815 (Court's Order denying Plaintiffs' motion). Thus, although the Plaintiffs' current Motion treats the Disengagement Measures as a marker of the Defendants' compliance with the Judgment, they

[3] Despite numerous statements by the Plaintiffs suggesting that the Disengagement Measures were fully agreed upon by the Defendants, the Defendants did not agree to the numeric targets with respect to a reduction in waitlists for ICC or IHT that was ultimately incorporated into the Disengagement Measures. The Defendants' failure to meet these targets—which were never agreed upon—is a primary focus of Plaintiffs' Motion and request for relief.

are neither a part of the Judgment nor a measure of compliance with the Judgment, either by agreement of the parties or by Order of the Court.[4]

2. To the Extent Plaintiffs' Assertions Relate to New, Untried, and Unadjudicated Allegations, Such Alleged Violations Are Not Supported by Competent, Admissible Evidence.

Perhaps acknowledging that non-compliance with the Disengagement Measures does not equate to non-compliance with the Judgment, Plaintiffs expand their argument by asking this Court to enter an enforcement order because (1) the Defendants are in violation of the Medicaid Act based on "current violations of class members' federal legal rights to all necessary EPSDT services" and, in their view, (2) any violation of the Medicaid Act is a violation of the Judgment itself. P's Mem. P. 12. Whatever these alleged, non-specific and unarticulated violations are, they have not been proven by competent evidence and certainly have never been tried or adjudicated. More significantly, these *alleged* new violations cannot be a basis for finding that the Defendants are in violation of the 2007 Judgment. This case, now 18 years old (and six years past the prescribed end of the monitoring period), is simply not

[4] Nor should the Court decide, *sua sponte*, to use the Disengagement Measures as a lens through which to evaluate the Defendants' compliance with the Judgment. As the affidavit of Laura Conrad, the interim compliance coordinator (the "Conrad Affdavit"), attached hereto as Exhibit B, makes clear, while the numerical targets contained in the Disengagement Measures reflected the level of year-to-year improvement the Plaintiffs wished to see before endorsing an end to Court oversight, they are not at all well-calibrated to measure compliance with the Judgment, or even to assess the overall health of the Defendants' system of care. For instance, the Massachusetts Practice Review ("MPR") – which the Disengagement Measures use as a proxy for measuring the quality of services delivered – is performed on only a small and statistically insignificant percentage of individual members' cases each year, and would be impracticable on a larger scale. *See* Conrad Affidavit at paras. 8-11. Similarly, there is no standard waitlist practice among providers, and the resulting aggregated waitlist data may duplicate those members on multiple waitlists, or who have begun services with a different provider. Therefore, the data points and the resulting Disengagement Measures do not inadequately inform the Court about the quality or availability of the remedy services.

the proper forum for adjudicating any new *alleged* violations of the Medicaid Act, whatever they may be.

Further, even if the Court were to entertain Plaintiffs' allegations of new, untried, and unadjudicated allegations, the Plaintiffs have not demonstrated with credible evidence that the Defendants have committed any violations of the "federal legal rights" of class members *and* that any such violations of the Medicaid Act equate to violations of the Judgment. For example, the Plaintiffs primarily rely on an affidavit from Lisa Lambert, the Director of the Parent/Professional Advisory League ("PPAL") (the "Lambert Affidavit") to suggest that: (1) waiting lists and delayed access to care remain a common theme for families; and (2) children and families are being harmed by delayed access to care. *See* P's Mem. pp. 3-4; Lambert Aff. ¶¶ 6-14 & 15-23. Underlying these averments, Plaintiffs, through Lambert's assertions, rely heavily on PPAL records of undated conversations with unidentified families of children who are having difficulties accessing treatment. However, the Lambert Affidavit is devoid of competent or admissible evidence of the matter Plaintiffs seek to prove, and therefore does not help the Plaintiffs to meet their evidentiary burden to demonstrate that the Defendants have violated Plaintiffs' "federal legal rights" and that any alleged violations by the Defendants amount to a violation of the Judgment.

As an initial matter, the "evidence" upon which Plaintiffs rely in the Lambert Affidavit is inadmissible because it is premised on multi-level hearsay. The original declarants (families of children who called PPAL for advice), the PPAL employees who spoke with the families, and the PPAL employees who reported these situations to Lambert are all unidentified and unidentifiable. *See* Fed. R. Evid. 801(c), 802, 805; *Vazquez v. Lopez-Rosario*, 134 F.3d 28, 34 (1st Cir. 1998) (exclusion of multi-level hearsay proper where original declarant unknown). This fact alone makes the declarants' statements unverifiable and inadmissible.

The Plaintiffs' Motion is further undermined by the lack of essential details in the Lambert Affidavit regarding the unidentified families who contacted PPAL or participated in their surveys. Absent such details, it is unclear whether their experiences are even relevant to the Court's consideration of Plaintiffs' Motion. For example, the affidavit does not specify whether the children referenced throughout the affidavit *were even enrolled* in MassHealth at the time they were seeking assistance from PPAL. The same is true as to the specific children whose familial experiences are recounted in paragraphs 19-21.

While the Plaintiffs gloss over this deficiency in their memorandum—instead treating every PPAL contact as if it involved a Medicaid-enrolled child—there is no reason for this Court to accept Plaintiffs' unsubstantiated assertions. This is particularly true where the affidavit makes clear that PPAL assists more than just children who are enrolled in MassHealth *and* that families of children who are not enrolled in MassHealth were regularly contacting PPAL and participating in PPAL's surveys. *See, e.g.*, Lambert Aff. ¶ 3 ("Most recently PPAL used survey responses to create a petition to the division of insurance to expand the mental health benefit for commercial insurance").

Additionally, except for a brief reference in paragraph 7 to a January-to-June-2018 time period, none of either the generalized or specific familial experiences that Plaintiffs rely upon in the Lambert Affidavit are dated, meaning any alleged experiences could just as likely be from as early as 2010 as they are from 2018. *Comp*. Lambert Aff. ¶ 7 *with* id. at ¶¶ 8-21.

Furthermore, the Plaintiffs fail to identify the service providers at issue in the Lambert Affidavit, preventing the Defendants and the Court from determining whether the purported experiences come from a small number of providers, or, as Plaintiffs imply, manifest a broader

problem.[5] Such deficiencies make the affidavit inadmissible from an evidentiary standpoint, and, as such, cannot even sustain the initial aspect of Plaintiffs' burden—proving the alleged violations of Plaintiffs' "federal law rights."

Finally, and critically important from the Defendants' perspective, Plaintiffs do not assert—and Lambert never avers—that PPAL informed MassHealth of the problems asserted in the affidavit so that MassHealth could investigate them and intervene, as appropriate, to help resolve them. *See* Conrad Affidavit, ¶ 3. Indeed, MassHealth has not been able to locate any complaint forwarded by PPAL relative to the three families anonymously referenced in the affidavit. *Id.* ¶ 3. Therefore, Plaintiffs cannot sustain an assertion of non-compliance relative to unverified circumstances of which Defendants were never informed and which they were never given an opportunity to correct.[6]

Nor has Lambert contacted MassHealth with information or complaints related to families being advised to file "Child Requiring Assistance" petitions in order to access care. Importantly, no *MassHealth member* would ever need to file such a petition to access remedy services. Fundamentally, these assertions are irrelevant to the Plaintiffs' Motion or the Court's

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[5] This lack of specificity is woven throughout the Lambert Affidavit, making it impossible for the Court to know precisely the nature or extent of the circumstances described. For example, the Lambert Affidavit uses conclusory terminology including: "many," "some," "often," "fewer," "routinely," "numerous," and "lengthy" without providing the Court with any data to support the actual numbers of individuals or instances, periods of time, or duration of circumstance to support any of the assertions made. *See generally* Lambert Affidavit.

[6] MassHealth would take such complaints seriously if contacted about them and would work to resolve them, as appropriate, in a timely manner. *See* Conrad Aff. ¶¶ 4-5.

determination because the Court can draw no inference that such assertions could ever involve class members.[7]

In sum, inadmissible, multi-level hearsay recounting undated experiences of unidentifiable children and families who may or may not have been MassHealth members at the time of the incidents (and of whom MassHealth was never informed) cannot form the factual basis on which the Court can find any alleged violations of the Medicaid Act, let alone the Judgment itself.

C. Even if the Plaintiffs Had Carried Their Burden to Demonstrate that the Defendants Have Failed to Comply with the Judgment, and that the Court Could Enter an Order to Remedy Non-Compliance, the Proposed Additional Terms are Not Tailored to Correct Those Violations.

As discussed above, the Plaintiffs' Motion is both legally and factually unsupported and therefore fails to carry their burden of proving that the Court may take action to "enforce" the Judgment. Even if they had cleared these hurdles, however, the additional terms they propose be added to the Judgment are not tailored to remedy the "violations" they allege and the non-compliance they imply.

As a ground for why this Court should order much of the specific relief sought by the Plaintiffs, the Plaintiffs rely on an affidavit from Vicker V. DiGravio, III ("DiGravio Affidavit"), the President and CEO of the Association of Behavioral Healthcare ("ABH"). DiGravio avers that ABH is a trade organization whose membership includes the primary providers of Medicaid-funded community-based behavioral healthcare services in the

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[7] MassHealth takes these assertions seriously, regardless of their relevance to the pending lawsuit. MassHealth has issued guidance directly to families on how to apply for MassHealth coverage for children in need of remedy services. *See* https://www.mass.gov/files/documents/2016/07/sa/cbhi-ha.pdf.

Commonwealth and who also provide "the majority of the community-based services" under the Judgment. DiGravio Aff. ¶¶ 3-4.

The DiGravio affidavit is flawed for at least three reasons. First, as neither DiGravio nor ABH is a provider of remedy services, the information contained in the affidavit is largely based on inadmissible hearsay derived from the "reports" of ABH members and other unidentified sources. *See* DiGravio Aff. ¶ 5. Second, DiGravio's opinion on the appropriate steps the Defendants should be required to take is inadmissible opinion testimony of a non-expert and must be understood in the context in which such opinion is proffered: ABH is an advocacy and lobbying organization that represents providers who stand to benefit financially from any order this Court issues regarding rate increases for remedy services and other behavioral health services that were not mentioned in the Judgment. *See* DiGravio Aff. ¶¶ 2-3. Finally, DiGravio's anecdotal statements regarding the supposed impact on waitlists and staff retention of various rate-setting policies fail to substantiate Plaintiffs' burden of proving that their requested relief will actually address any alleged violations and non-compliance they are asserting on a system-wide basis. As discussed below, the data available to the Defendants refute these anecdotal assertions.

The Plaintiffs' lack of competent proof to support their proposed modifications to the Judgment is sufficient grounds for the Court to deny the Plaintiffs' Motion. Here, however, the Court can deny the Motion for the additional reasons that fact and logic belie the purported impact such modifications would have on curing any alleged non-compliance or other "violations."

1. The Plaintiffs' Proposals to Address Wait Times for ICC and IHT Are Not Likely to Succeed in Reducing Waitlists.

The Plaintiffs' Motion posits that changing the method and the rates by which MassHealth pays clinicians who provide ICC and IHT would have a direct and positive impact on the supply of clinicians willing to work in this capacity and, consequently, would lead to a decrease in waiting times for those services. Specifically, they would have the Court require MassHealth to raise reimbursement rates for IHT services and order MassHealth to implement, on a state-wide basis, a "day-rate" payment methodology for ICC providers at the particular rate requested by ABH. The Plaintiffs' request to fix wait times through these proposed orders is both flawed and moot.

First, as a legal matter, there is not a private right of action to increase rates. *See Armstrong v. Exceptional Child, Inc.*, 135 S.Ct. 1378, 1385 (2015) (holding that 42 U.S.C. § 1396a(a)(30)(a), the statute governing the setting of Medicaid reimbursement rates, cannot be enforced by private suit, "and respondents cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement"). *See also Long Term Care Pharmacy v. Ferguson*, 362 F.3d 50 (1st Cir. 2004).[8] Furthermore, entry of an order at this level of granularity would be to displace MassHealth as the manager of its own network, a result the Supreme Court has repeatedly warned against. *See, e.g., Horne v. Flores*, 557 U.S.

[8] In his concurring opinion in *Armstrong*, Justice Breyer noted that barring private enforcement in the area of Medicaid rate-setting had a practical as well as a statutory rationale: "To find in the law a basis for courts to engage in such direct rate-setting could set a precedent for allowing other similar actions, potentially resulting in rates set by federal judges (of whom there are several hundred) outside the ordinary channel of federal judicial review of agency decisionmaking." *Armstrong*, 135 S.Ct. at 1386 (Breyer, J., concurring).

433, 450 (2009) (discussing the necessity of returning "responsibility for discharging the State's obligations . . . promptly to the State and its officials" after entry of remedial order).

Second, as a factual matter, MassHealth's most recent review of the Unified Financial Statements filed by Community Service Agencies ("CSAs") that provide ICC and Family Partner remedy services revealed that CSAs are, on average, realizing approximately 9% margins on the delivery of these services to MassHealth members. Affidavit of Stephanie Brown, Director of the Commonwealth's Office of Behavioral Health, attached hereto as Exhibit A (the "Brown Affidavit"). In fact, all but three of the Commonwealth's 32 CSAs reported positive margins on their ICC and Family Partner services, with some CSAs realizing profits of over 20%. Brown Aff. ¶¶ 4-6. The evidence thus suggests that the rate increases and change to the rate structure that Plaintiffs have requested will be unlikely to result in meaningful impact on waitlists where CSAs are already sufficiently funded to invest in staff training, development, supervision, and recruitment. However, MassHealth is contemplating an increased rate for IHT providers in the proposed rate regulations. Brown Aff. ¶¶ 10-11. Therefore, although Defendants do not agree with the Plaintiffs' assertion that higher rates will lead inexorably to shorter waitlists, the Plaintiffs' current appeal to this Court to order MassHealth to increase the IHT rate is moot. MassHealth is already in the promulgation process for a rate increase for IHT services.

Furthermore, the Plaintiffs' request for a state-wide "day rate" for ICC providers is premised on the suggestion that the standard 15-minute unit payment methodology places such a significant administrative burden on providers that it depresses productivity and therefore results in high staff turn-over and waitlists for members seeking ICC services. Although MassHealth is still reviewing the possible correlation between converting to a day rate and reducing waitlists for members seeking ICC services, the proposed rate regulation changes do

implement the day rate state-wide. Brown Aff. ¶¶ 7-9, 11. Thus, even if the Plaintiffs were correct regarding the presumed relationship between implementing the day rate and reducing the waitlists, MassHealth is already taking all steps possible to adopt a day rate through the regulatory promulgation process, and the Plaintiffs' request that the Court intervene regarding a day rate is moot.

The Plaintiffs also restate several proposals to decrease wait lists from their May 2018 filing. One suggestion is to order the Defendants to compel the Managed Care Entities ("MCEs") with whom they contract to increase capacity of the IHT service by a fixed percentage. This simplistic request ignores the fact—demonstrated throughout the Defendants' status reports over the past two years—that stagnant capacity caused by workforce shortages is precisely the issue constraining access to IHT and ICC. To order the Defendants to create new capacity is essentially ordering the Defendants to compel MCEs to contract with providers that may simply not exist. Such an order would accomplish nothing more than to add a new, unproven, and unadjudicated numerical benchmark to an 11-year-old Judgment, knowing *a priori* that the Defendants, despite best efforts, are unlikely to meet it.[9]

Finally, the Plaintiffs ask the Court to order Defendants to manage their MCEs in a prescribed manner, making broader use of their contractual right to compel underperforming CSAs (i.e., CSAs with significant waiting lists) to file corrective action plans and, in some cases, to terminate such providers from MCEs' networks. The Defendants have already

[9] Plaintiffs have also failed to provide any legal basis on which to suggest that such numeric target—like any of the numeric targets in the Disengagement Measures—has any legal significance to curing the supposed non-compliance or violations they have alleged in their Motion. Absent a legal or factual basis to support such an order, the Court cannot and should not find that the Plaintiffs' requested relief is tailored to addressing the need for modification of the Judgment. Conrad Aff. ¶¶ 8-10.

spelled out the impracticability of this approach in their opposition to the Plaintiffs' May 2018 filing. *See* Docket No. 839, filed on June 5, 2018, at 11. Among other things, absent evidence that a CSA's wait list is the product of gross misfeasance or neglect (of which Defendants have no evidence), logic suggests that removing a CSA from the provider network would merely exacerbate the capacity problem.

As such, Plaintiffs' Motion should be denied because their suggested modifications are not tailored to address the unproven non-compliance with the Judgment.

2. The Plaintiffs' Proposed New Restrictions on the Defendants' Management of Certain Outpatient Behavioral Health Services is Not Tailored to Address Any Violation of the Judgment.

The Plaintiffs have also renewed their request that the Court modify the Judgment to mandate that the Defendants take various actions related to certain outpatient behavioral health services that were not previously mentioned in the Judgment. *See* Docket No. 777. The Judgment does not order the Defendants to provide "care coordination" to all class members. Rather, the obligation the Judgment places on the Defendants with respect to the delivery of care coordination to class members is to add Intensive Care Coordination as a covered service and to make the service available for members for whom the service was medically necessary and who chose to receive it. The Judgment does not require the Defendants to make ICC available to all class members. Nor does the Judgment require the Defendants to provide "care coordination" to class members outside of the delivery of ICC. Although the Plaintiffs have opposed this decision since its inception—contending that children with SEDs, irrespective of the acuity of their needs, should be offered ICC—the Court adopted the Defendants' design, and the Plaintiffs took no appeal.

As part of the disengagement process, the Plaintiffs sought to resurrect these old objections by demanding that the Defendants take certain actions to improve the delivery of

"care coordination" outside of ICC through certain outpatient behavioral health services, including counseling, case consultations, family consultations, and collateral contacts.[10] As part of their ongoing quality improvement efforts and in an effort to reach agreement on the end to court monitoring, the Defendants implemented these reforms, which were also listed among the Disengagement Measures. Defendants' voluntary implementation of reforms outside of the strictures of the Judgment does not sustain Plaintiffs' burden to prove that such actions may validly be entered as an order of the Court.

Furthermore, to enter the proposed order would be to expand the reach of the Judgment without a factual or legal basis. The Plaintiffs have proffered no basis on which to support a contention that the Court should revisit its decision that ICC be available only to those class members who meet medical necessity for the service and choose to have it. Nor have the Plaintiffs substantiated their request that Defendants be obligated to deliver "care coordination" to class members outside of ICC when the Court failed to order this relief at the time the Judgment was entered. Therefore, the Plaintiffs' Motion should be denied in this regard.

II. The Plaintiffs Have No Entitlement to Relief Under Rule 60(b)(5) and, In Any Event, Have Not Met Their Burden of Proving That the Judgment Requires Modification.

A. Rule 60(b)(5) Authorizes a Court to Grant "Relief" from a Judgment, But Not to Impose Additional Requirements.

The Plaintiffs bring their current Motion under both Fed. R. Civ. P. 60(b)(5), and the "modification" provision of the Judgment. Fed. R. Civ. P. 60(b)(5) provides, in part, that "the court may *relieve* a party . . . from a final judgment, order, or proceeding" if "(5) the judgment

[10] In this context, case consultation, family consultation, and collateral contact services are services delivered by traditional outpatient behavioral health providers, through which the provider consults with a member's other health care providers, care takers, or natural support systems (such as schools, etc.) regarding the member's care.

has been satisfied, released, or discharged; . . . or applying it prospectively is no longer equitable." Because the Plaintiffs are not seeking relief from the Judgment, but are instead attempting to enlarge the obligations it imposes on Defendants, the rule simply does not apply. Nor does the Judgment's "modification for good cause" clause, Judgment at para. 50, permit a wholesale expansion of this nature. Therefore, Plaintiffs fail to assert grounds for relief and their Motion should be denied.

B. Even if the Plaintiffs Could Invoke Rule 60(b)(5), They, as the Party Seeking Modification of the Judgment, Bear the Burden of Proof.

Even if Fed. R. Civ. P. 60(b)(5) permitted a prevailing plaintiff to seek to *supplement* the terms of a judgment (rather than permitting a defendant to obtain "relief" from the judgment), the proponents of such a modification bear the burden of proving that prospective enforcement of the judgment is inequitable and that their proposed modification is properly tailored to correct ongoing federal-law violations that were identified in the Judgment. Here, the Judgment was crafted by the Court to cure the Medicaid Act violations identified at trial. *See Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the … violation."). Such restraint is all the more necessary in view of principles of comity and federalism that must govern when a federal court directs relief to the operation of state programs. *See, e.g., Board of Education of Oklahoma City Public Schools, et al. v. Dowell,* 498 U.S. 237, 249-250 (1991) (determining whether defendant school board had substantially complied with federal court's desegregation decree was central to analysis of whether it had cured underlying constitutional violation, and was therefore entitled to dismissal of decree). To supplement the obligations enumerated in the Judgment, after the Defendant has already complied with them, is to invite the specter of perpetual judicial oversight, a result

strongly disfavored by the Supreme Court. *See Horne v. Flores*, 557 U.S. 433, 447 (2009) (discussing "vital national tradition" of permitting state and local authorities to determine how to comply with dictates of federal law).

As the Supreme Court stated in *Rufo*, a court may entertain a request by a defendant seeking relief only to the extent the defendant meets its burden of demonstrating that "a significant change in circumstances warrants revision of the decree." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 467, 384 (1992). *See, e.g., Ricci*, 544 F.3d at 21 (denying request for relief where purported change in circumstances—the state defendant's decision to close the Fernald Development Center—was anticipated by all parties at the time of the underlying consent decree). Here, by contrast, the Plaintiffs seek to modify a Judgment that spells out the duties of the Defendants. Even if *Rufo* applied here, the Plaintiffs could seek modification of the Judgment only if there were an intervening, unanticipated change in circumstances. *See Rufo*, 502 U.S. at 383. Indeed, because Fed. R. Civ. P. 60(b)(5) provides only for "relief" from judgment, where such a modification is sought, the dispute has almost invariably arisen because the defendant has claimed that it has become impossible to comply with one or more terms of the judgment, and has therefore asked to excise such obligation(s) from the judgment's text. *See, e.g., United States v. Puerto Rico*, 642 F.3d 103, 107 (1st Cir. 2011) (state defendant sought relief from provision of judgment requiring it to hire five new corrections officers each month, on ground that requirement had proven to be economically infeasible).

Here the Plaintiffs do not seek "relief" from a pre-existing judgment, but instead to expand it. Even assuming Fed. R. Civ. P. 60(b)(5) authorizes this Court to award relief to the Plaintiffs, as the moving party, the Plaintiffs face at least the same burden of proof articulated by the Supreme Court in *Rufo*: demonstrating that an unanticipated change in circumstances

has rendered it inequitable for the Court to continue to enforce the underlying judgment as written. *Rufo*, 502 U.S. at 383-384.

C. The Plaintiffs Have Not Satisfied Their Burden of Showing a Change in Circumstance That Was Unanticipated at the Time the Judgment Entered.

The Plaintiffs have articulated no unanticipated change in circumstances, and to the extent Plaintiffs' Motion addresses this element at all, they point to wait times for ICC and IHT services, and to the fact that the care coordination activities that occur outside the context of ICC are not under the supervision of the Court. As to wait times, the Judgment says nothing about the timelines under which ICC and IHT services must be delivered, as those services did not exist at the time of Judgment, and federal law—then as now—requires only that EPSDT services be delivered with appropriate "timeliness," determined by reference to "reasonable standards" developed in consultation with medical and dental practitioners, generally not to exceed six months. *See* 42 C.F.R. § 441.56(e). The Plaintiffs allege no unanticipated change, either in fact or in law, that has arisen since the entry of Judgment, and that renders continued enforcement of the Judgment as written inequitable. As to "care coordination" that occurs in the context of traditional outpatient therapy, as discussed above, in entering the Judgment, the Court explicitly rejected Plaintiffs' proposal that all class members receive care coordination through ICC and failed to include any provision in the Judgment requiring Defendants to deliver "care coordination" outside of ICC. Therefore, neither of these facts constitutes unanticipated changed circumstances from the time of Judgment. *See, e.g.*, *Ricci*, 544 F.3d at 21 (denying request for relief where purported change in circumstances—the Commonwealth's decision to close the Fernald Development Center—was anticipated by all parties at the time of the underlying consent decree).

CONCLUSION

For the reasons set forth above, Defendants ask that the Court deny the Plaintiffs' Motion, with prejudice.

Respectfully submitted,

MASSACHUSETTS EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

By its attorney,

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Date: September 10, 2018

CERTIFICATE OF SERVICE

I, Daniel J. Hammond, Assistant Attorney General, hereby certify that the foregoing document, which was filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 10, 2018.

/s/ Daniel J. Hammond
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