

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

_____)	
ROSIE D., <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.
)	01-30199-RGS
)	
CHARLES BAKER, <i>et al.</i>)	
)	
Defendants.)	
_____)	

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF MOTION TO MODIFY
PARAGRAPH 52 OF JUDGMENT AND TO REINSTATE
COURT MONITORING AND REPORTING**

I. Introduction

The reinstatement of active court monitoring and reporting is necessary to assist the Court in adjudicating the status of compliance, in the context of the defendants’ renewed Motion for Termination,¹ and to evaluate the need for further modification of the Judgment, proposed by the plaintiffs’ Motion to Modify the Judgment to Ensure Timely Access to Services and their Motion to Modify the Judgment on Outpatient Services.² Such a modification is consistent with the purpose and provisions of the Judgment, the status of this litigation, and the requirements of federal law.

Since the remedial Order entered in 2007, court monitoring and reporting has always been closely tied to, and intended to help the Court evaluate final compliance with its Judgment.

¹ Consistent with the Court’s recent Scheduling Order, Doc. 908, the defendants will file their Motion for Compliance on February 1, 2021.

² Under this same Scheduling Order, the plaintiffs will file their two motions for modification on December 21, 2020.

The parties' multiple, voluntary extensions³ of these oversight tools were a direct result of ongoing efforts to fully implement the remedial Order. This connection between the need for active court oversight, with the assistance of the Court Monitor and periodic reporting by the defendants, and enforcement of the Judgment was made explicit in the Defendants' Motion for Substantial Compliance and Termination of Court Monitoring and Reporting, Doc. 848, which sought to demonstrate substantial compliance with the Judgment as the basis for terminating its monitoring and reporting requirements.

Although the First Circuit criticized the District Court for failing to conduct a formal modification analysis before extending the monitoring and reporting requirements, it did not address whether the facts indicated "good cause" as required by ¶50 of the Judgment or a change in circumstance, as required by Rule 60. Nor did it preclude the re-instatement of these provisions if the appropriate modification standards were met. *Rosie D. v. Baker*, 958 F.3d 51, 59 (1st Cir. 2020).⁴ The panel majority made clear that its opinion was "narrow," *id.* at 53, in anticipation of further substantive proceedings below, including adjudication of the status of compliance and related motions for modification of the Judgment. *Id.* at 59.

In order to assist the Court in resolving the upcoming motions for modification and termination under Fed. R. Civ. P. Rule 60(b), the provisions on monitoring and reporting should be re-instated. As described below, the Court has two sources of authority under which it may order such a modification. First, the Judgment itself, through its 'good cause' provision in Paragraph 50, provides a basis for determining that the requested modification is necessary to

³ Beginning in June 2012, the parties agreed to ten, six-month extensions of Paragraph 52 of the Judgment providing for monitoring and reporting.

⁴ "On remand, the judge assigned to the case, on proper application, may examine whether the Plaintiffs have demonstrated good cause to modify the Judgment to extend the monitoring requirements under the framework provided by *Rufo*." *Rosie D.*, 958 F.3d at 59.

collect and analyze implementation data, to effectively adjudicate upcoming motions, and to ensure the objectives of the remedial Order are achieved. Second, Fed. R. Civ. P. 60(b)(5) offers a well-established mechanism by which to order an appropriately tailored modification to an existing court order.

There are two distinct but related set of facts – one in 2012 and the other in 2018 – which constitute good cause and changed circumstances that warrant modification of the Judgment. First, in June 2012, the Court found that the defendants had not achieved substantial compliance with all provisions of the Judgment within the five-year timeline projected by the Court and the parties. As a result, it extended the term for monitoring and reporting, with the assent of all parties, in “an agreed-to modification of the Judgment,” while the parties developed exit criteria and the defendants sought to achieve compliance with the Judgment. Doc. 877 at 24. Then in 2018, after agreeing to the Joint Disengagement Measures that set the standard for compliance, the defendants repudiated the Measures, refused to agree to additional extensions of monitoring and reporting, and moved for a finding of substantial compliance with the Judgment, which the Court denied. Given this second change in circumstances, a comprehensive factual analysis of system-wide compliance must be conducted with regard to all remaining provisions of the Judgment.⁵ A time-limited, focused, extension of court monitoring and reporting is reasonably calculated to address this changed circumstance precisely because these provisions were designed to support and inform the Court’s final determination of compliance with its Judgment.

⁵ The plaintiffs and defendants have agreed that certain provisions of the Judgment have been satisfied, including the defendants' obligations to “inform, educate, and provide outreach to class members concerning the new home-based service system, to establish a system for conducting behavioral health screening and treatment referrals, and to develop methods of data collection necessary to implement the Judgment.” Doc. 906 at 2, Plaintiffs’ Status Report (October 5, 2020). Consequently, for purposes of the agreed-to briefing, the Court has noted that these provisions are no longer part of the litigation. Doc. 908.

Under either modification provision, it is clearly within the Court's authority to determine that the services of the Court Monitor, and updated reporting from the defendants, are necessary to inform its analysis of the facts surrounding the upcoming motions, to adjudicate disputed claims regarding compliance and continuing federal Medicaid law violations, and to ascertain whether a durable remedy has been achieved.

II. Background

A. The Judgment's Monitoring and Reporting Provisions

The Court's January 26, 2006 liability decision directed the parties to negotiate a joint remedial order. After failing to reach agreement, the parties each submitted proposed remedial plans. *Rosie D. v. Patrick*, 497 F. Supp. 2d 76 (D. Mass. 2007). The Court chose to enter the defendants' plan, with several significant modifications. *Id.*⁶ For instance, the Court rejected the defendants' request for discretion to unilaterally modify any provision of the plan, directing instead, that modifications may occur only for good cause, by order of the Court, or by agreement of the parties. *Id.* at 77. The Court also declined to end its enforcement and modification authority on a date certain, referencing its obligation to ensure full implementation:

Defendants are free to move to terminate the court's jurisdiction at any time that a remedy is securely in place, an inevitable termination of the court's supervisory authority after five years would risk compelling the court to abdicate its responsibility to insure that the remedy is properly effectuated.

Id. at 79.

Finally, the Court rejected language that would limit its ability to enforce all aspects of the Judgment, including "a number of initiatives by Defendants that are not explicitly spelled out in either of the violated provisions." *Id.* The Court concluded that it had "the responsibility to

⁶ These changes also are described in described in the Court's February 22, 2007 Order, *Rosie D. v. Romney*, 474 F. Supp. 2d 238, 240-41 (D. Mass. 2007).

[e]nsure that Defendants take whatever actions are reasonably necessary to remedy the violations found in its judgment on liability.” *Id.* (noting that “the court’s liability decision was anchored on its finding that the requirements of the Medicaid statute’s EPSDT and “reasonable promptness” provisions had not been satisfied for very many class members”).

Since the inception of the remedial phase of this case, the parties and the Court agreed that it was important to have an independent Court Monitor who would assist the defendants in meeting their obligations under the Judgment and assist the Court in evaluating compliance with its Order. Therefore, the Judgment required the appointment of a Court Monitor with a broad set of responsibilities for supporting, evaluating, and facilitating compliance. *See* Judgment, ¶¶48, Doc. 367-2.⁷ The Court Monitor served at the discretion of the Court and was vested with authority to independently review the defendants’ compliance with the Judgment, respond to complaints concerning compliance, and make recommendations for corrective actions intended to redress problems and facilitate implementation. Judgment, ¶¶48. Given the importance of data collection under the Judgment, and the need to track the development and delivery of medically necessary services to class members across the Commonwealth, the Court also adopted a periodic, semi-annual reporting requirement for the defendants. Judgment, ¶¶47b. These reports would “describe defendants’ actions to address each provision or section of this Judgment” and “identify any obstacles that have impeded compliance with these provisions.” *Id.*

⁷ The Monitor’s specific authorities, as enumerated in the Judgment, are to: “(1) receive information relevant to defendants’ obligations under this Judgment; (2) coordinate and facilitate meetings between parties; (3) independently review the defendants’ compliance with this Judgment; (4) respond to complaints concerning compliance or other actions of the defendants; (5) recommend corrective or further actions necessary to redress any problems identified in implementing this Judgment; (6) mediate disputes between the parties; and (7) take whatever actions are useful to facilitating the timely implementation of this Judgment.” Doc. 367-2 at ¶48.

At the time the Judgment was entered, both the Court and the parties presumed that initial implementation could be completed by 2009,⁸ and substantial compliance achieved within five years, at which point the need for the Court Monitor, and the related reporting provision, would end.⁹ This presumption was based on time lines negotiated by the parties, presented in the defendants' remedial plan, and adopted in the Court's final Judgment. Judgment, ¶¶34-39. However, the Court's July 16, 2007 Order explicitly reserved the authority and discretion to extend its oversight until the Judgment was, in fact, fully implemented. *Rosie D.*, 497 F. Supp. 2d at 79-80.

B. The Failure to Achieve Substantial Compliance Within Five Years

The defendants' initial efforts to implement the Court-ordered remedy are detailed in multiple filings in this Court and the First Circuit. *See, e.g.*, Doc. 877 at 19-20; *Rosie D.*, 958 F.3d at 60-62. Delays in the roll out of home-based services,¹⁰ deficiencies in the timely delivery of ICC services,¹¹ and the absence of crisis stabilization¹² were among the issues impacting the early implementation of the remedy, and finally prompted the plaintiffs to file two motions for noncompliance in 2011.

In early 2012, the Court suggested the need for continued monitoring and reporting beyond the five-year deadline. *Rosie D.* Tr. 8:7-10 (March 20, 2012) ("I have a very hard time seeing that you will be able to say that you've substantially implemented the remedial order by July of 2012."). The defendants consented to such an extension in open court: "We really don't

⁸ *See* Doc. 877 at 9 ("The final substantive section of the remedial order, I(E), sets forth a timetable for development of the service enhancements, with implementation initially scheduled for completion at the end of June of 2009.... This was, all parties now acknowledge, an unrealistically optimistic deadline.").

⁹ Even the defendants' proposed remedial plan drew a clear connection between the anticipated completion of the implementation process, and the recommended five-year timeline for monitoring and reporting. *See, e.g.*, Defendants' 8/29/06 Remedial Plan Proposal, Doc. 339-2 at 27.

¹⁰ *See* Doc. 443, Memorandum and Order Allowing Defendants' Motion to Modify.

¹¹ *See* Docs. 507 and 508, Plaintiffs' Motion on Timely Access to Remedial Services and Memorandum in Support.

¹² *See, e.g.*, Doc. 492, Order Requesting Written Report on Status of Crisis Stabilization.

object to your suggestion of extending the monitoring period explicitly through the end of 2012, with the caveat that that doesn't necessarily mean that's the end." *Rosie D.* Tr. 17:4-9 (March 20, 2012). Thus, the very first extension of monitoring and reporting was based upon the Court's finding that the defendants had not fully implemented the Judgment within the anticipated five year period. And the very purpose of the extension was to afford the Court the continued advice and assistance of the Court Monitor, as well as data from the defendants' reports, to evaluate the status of compliance in the future. The Court later summarized its intention to extend monitoring, implementation, and reporting to December 31 "without any disagreement," *id.* Tr. 64:6-14, and memorialized this change in its March 20, 2012 Order. Doc. 571 at 2.

C. Voluntary Continuation of Monitoring and Reporting During the Disengagement Process

Between 2012 and 2018, the Court continued to rely on the parties' agreement to extend monitoring and reporting – typically in six month intervals – as they negotiated and sought to implement a plan to end active Court oversight through the achievement of specific Joint Disengagement Measures. Doc. 877 at 20-24. As the Court noted in its February 7, 2019 Order, approximately ten such Court Monitor extensions took place between 2012 and 2017 constituting, in the Court's view, "an obvious voluntary modification of the remedial order's oversight and monitoring provision." *Id.* at 24. These extensions also were based on delays in achieving joint disengagement criteria (the parties' agreed-upon alternative to adjudicating compliance with the Judgment), and they served a similar purpose – to assist the Court in evaluating whether the underlying purpose of the Judgment had been achieved and a durable remedy established.

On February 13, 2017, final Joint Disengagement Measures were presented to the Court. Doc. 776-1. Intended to demonstrate incremental improvement over time, these Measures

contained specific numerical benchmarks to be achieved between 2017 and the end of 2018. Although the defendants repeatedly emphasized the voluntary nature of these Measures, and resisted any Court decision to formally order them, all parties understood them to be a negotiated exit strategy, for which the alternative would be demonstrating full compliance with every provision of the Judgment. As the Court observed at the time, “I don't think defendants can escape the implication that this agreement, whether it's a Court order or not, is intended to embody this final phase of compliance with the Court's original remedial order.” *Rosie D. Tr.* 19:22-20:3 (April 6, 2017).¹³ Ultimately, the District Court’s decision to deny termination of monitoring and reporting rested not on the failure to achieve these Measures, but on its findings of “glaring” evidence of noncompliance with Section I.C of the Judgment and continuing federal law violations:

Complete termination of monitoring and supervision at this time, however, would require the court to turn a blind eye to *Defendants’ persistent, substantial violation of the remedial order - a violation that continues to put many SED children at serious risk of harm.*

Doc. 877 at 7 (emphasis added).

D. The Practical Consequences of Ending Monitoring and Reporting

The 2017 Joint Disengagement Measures provided an agreed-upon standard for evaluating substantial compliance with the Judgment, and an exit strategy for ending active Court oversight. The defendants’ decision to disavow those measures in 2018, and the parties’

¹³ Although the Court declined to formally order the Joint Disengagement Measures in 2017, it noted that the measures:

[G]ive practical form to the substantive terms of the Remedial Order in the context of the final phase of implementation. The court manifestly possesses the power to enforce these measures to the extent necessary to ensure compliance with the Remedial Order. The fact that these measures have been agreed to voluntarily – as an expression of good faith on the part of both parties – does not in any way undercut the court’s responsibility to ensure that the Remedial Order is fully complied with through the implementation of the disengagement measures.

Doc. 815 at 3 (Order Re: Plaintiffs’ Motion to Approve Joint Disengagement Measures & Motion to Modify the Judgment To Incorporate Provisions on Outpatient Therapy (Dkt. Nos. 776 & 777)) (September 27, 2017)

subsequent inability to agree upon another exit strategy for the litigation, has created a substantial change in circumstances. It will now be necessary to adjudicate unresolved assertions of compliance first presented in the defendants' 2018 Motion for Substantial Compliance, Doc. 848, and disputed in plaintiffs' Opposition. Doc. 857. As demonstrated by Defendants' previous Statement of Material Facts, Doc. 850, and the prior proceedings held by this Court in September of 2018, this is a highly fact-based analysis, involving both quantitative and qualitative information about the performance of the remedial service system, the need for specific modifications to the Judgment, the status of compliance, and the existence of continuing federal law violations found by the District Court. Absent both an assessment of those facts by an independent mental health professional, and reporting by the defendants of updated compliance activities, the Court will have no assistance in evaluating the historical context and relevance of this information.

III. The Standard for Modification Under Paragraph 50 of the Judgment

In 2007, as part of finalizing its remedial Order, the Court reserved two specific avenues for modification of its Judgment, in addition to the formal process set out under the Federal Rules – “for good cause upon application to the Court by either party; or by agreement of the parties.” Doc. 367-3, ¶ 50. This construct was intended to provide – and does in fact provide -- a more flexible alternative to the formal requirements of Fed. R. Civ. P. 60(b)(5). As such, the determination of what constitutes “good cause” is well within the discretion of the Court, and its authority to interpret its own Judgment. *See In re Pearson*, 990 F.2d 653, 657 (1st Cir. 1993) (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). Recognizing the unique aspects of structural injunctions, the First Circuit made clear in *Pearson*:

[W]hen, 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.

Id. at 657.

Based on this equitable authority, and in order to ensure that the requirements of the Judgment are satisfied in a timely fashion, the Court can apply the flexible modification standard in the Judgment, determine that there is good cause to alter timelines within its Order, and extend monitoring and reporting where necessary to evaluate or achieve compliance.¹⁴

¹⁴ See, *Navarro–Ayala v. Hernandez–Colon*, 951 F.2d 1325, 1338 (1st Cir.1991):

The rule of broad discretion in public interest cases is designed to give the district court flexibility in deciding exactly how the numerous conditions of a complex consent decree are to be implemented in practice. In overseeing broad institutional reform litigation, the district court becomes in many ways more like a manager or policy planner than a judge. Over time, the district court gains an intimate understanding of the workings of an institution and learns what specific changes are needed within that institution in order to achieve the goals of the consent decree.

Id.; See also, *McGoldrick v. Bradstreet*, 2019 WL 3491266, at *6 (S.D. Ohio August 1, 2019) (“Courts, therefore, have a duty to enforce, interpret, modify, and terminate their consent decrees as required by circumstance.”) (quoting *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1145 (6th Cir. 1997) (recognizing courts authority to retain jurisdiction over, protect the integrity of, and modify a consent decree “should changed circumstances subvert its intended purpose.”)); *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir.1987) (“We note that a district court's decision to modify a consent decree in an ongoing institutional reform case is committed to that court's discretion because it is intimately involved in the often complex process of institutional reformation. It has the personal knowledge, experience, and insight necessary to evaluate the parties' intentions, performances, and capabilities.”); *Thompson v. U.S. Dep't Of Hous. & Urban Dev.*, 404 F.3d 821, 827–28 (4th Cir. 2005) (“Equitable considerations are clearly factors a district court can address when they are related to a court's power and duty to modify, interpret, and oversee a consent decree.”)(citing *Waste Mgmt. of Ohio*, 132 F.3d at 1145).

IV. Modification of the Judgment for ‘Good Cause’ Is Appropriate and Consistent with The Court’s Enforcement Authority.

The Court’s February 2019 decision found noncompliance with its Judgment, and a continuation of the federal law violations that the Judgment was intended to redress. Given the factual findings that formed the basis of this decision, the breakdown of joint disengagement efforts, and the defendants’ refusal to voluntarily extend the term of the Court Monitor, the Court must now determine if further modifications to the Judgment are needed, update and adjudicate disputes regarding compliance with the Judgment as a whole, and evaluate whether a durable remedy exists. Both the defendants’ failure to achieve compliance with the Judgment within five years, as originally anticipated, and their repudiation in 2018 of the Joint Disengagement Measures as the agreed-to standard for ending active judicial oversight of the Judgment constitute good cause to modify the Judgment. These circumstances, the scope and complexity of the facts at issue, and the potentially dispositive nature of the impending motions require a reinstatement of monitoring and reporting obligations, at a minimum to assist the Court in evaluating the upcoming motions. Doc. 908 (October 7, 2020 briefing schedule).

Relinquishment of active court oversight, monitoring and reporting should not occur until the defendants have demonstrated substantial compliance with the Judgment, and cured the legal violations that Judgment was intended to redress, thus satisfying its basic purpose. *In re Pearson*, 990 F.2d at 658-59. Court monitoring and reporting are designed to inform the Court’s evaluation of the facts and evidence, aid in its assessment of the remedial system’s performance (including the provision of required services like Intensive Care Coordination), and assist in crafting any remedial actions required to address continuing violations of federal law. Given the recent case transfer, the significant gap in time since the District Court’s ruling in February 2019,

and the complex and potentially dispositive motions on the Court's briefing schedule, the Court should enter a narrowly focused and time-limited extension for court monitoring and reporting.

This Court has exercised its authority to continue monitoring and reporting when it believed termination was premature and harmful to its ability to oversee the Judgment. Doc. 869. In November 2018, the Court was unwilling to abruptly terminate the duties of the Monitor while the defendants' Motion to Terminate and plaintiffs' Motions for Modification were pending. The Court expressed its conviction that, "the Court Monitor will be essential, at a minimum, to permit a smooth wind-down of the Court's oversight." *Id.* Although the Court planned to address the question of the Monitor's continued appointment "in the rulings on the [plaintiffs] two motions," the defendants' appeal preempted that plan. During the pendency of the appeal, and upon motion by the plaintiffs, this Court again extended the Monitor's appointment. Doc. 889. Its decision to do so was reasonable, given the Court's continuing jurisdiction over the Judgment, the defendants' ongoing legal obligations to implement and deliver medically necessary services pursuant to its terms, and the likelihood of further compliance proceedings on remand.

V. The Standard for Modification of a Judgment Under Rule 60(b)

Fed. R. Civ. P. 60(b)(5) permits modification of or relief from a judgment when: (i) it "has been satisfied, released or discharged;" (ii) "it is based on an earlier judgment that has been reversed or vacated;" (iii) "applying it prospectively is no longer equitable," or (iv) there is "any other reason that justifies relief." The party seeking relief 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; *see 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); *Am. Council of the Blind v. Mnuchin*, 878 F.3d 360, 366–67 (D.C. Cir. 2017) (concluding that the government defendant’s “much greater than planned delay in providing meaningful access to visually impaired individuals is unquestionably a change in factual conditions.”); *Equal Employment Opportunity Comm'n v. UPS Ground Freight, Inc.*, 344 F. Supp. 3d 1256, 1263 (D. Kan. 2018) (concluding that defendants’ failure to ratify collective bargaining agreement constituted changed circumstances warranting modification consistent with language and goals of the declaratory judgment).

A. Changes in Circumstance Must Not Have Been Anticipated.

Rufo further instructs that the changes must not have been anticipated at the time the consent decree was entered or the order was issued. *See Rufo*, 502 U.S. at 385; *Ricci v. Patrick*, 544 F.3d 8, 21 (1st Cir. 2008) (conditions for modification not present and no justification for reopening consent decree involving Fernald State School, given no significant change in law or factual circumstances, since parties recognized at the outset that this facility might be closed); *but see Am. Council of the Blind v. Mnuchin*, 878 F.3d 360, 367 (D.C. Cir. 2017) (“the focus of Rule 60(b)(5) is not on what was possible, but on what the parties and the court reasonably anticipated”) (*citing United States v. W. Elec. Co., Inc.*, 46 F.3d 1198, 1205 (D.C. Cir. 1995)); *Evans v. Williams*, 206 F.3d 1292, 1298 (D.C. Cir. 2000) (“*Rufo*’s modification standard does

not require absolute unforeseeability. It is enough that the parties did not actually contemplate the changed circumstances.”).

B. Modification Is Appropriate When it Serves the Public Interest.

In 2009, the Supreme Court affirmed the *Rufo* standard for equitable relief in *Horne v. Flores*, 557 U.S. 433 (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.’” *Id.* at 453 (citing *Rufo*, 502 U.S. at 384). The Supreme 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”); *In re Pearson*, 990 F.2d 653, 658 (1st Cir. 1993) (district court’s sua sponte appointment of special master to evaluate the efficacy of long standing consent decree in institutional reform case was an appropriate exercise of its equitable authority to modify and enforce its remedial order)

Modification is particularly appropriate when it serves the public interest. *In re Pearson*, 990 F.2d at 658 (“The district court is not doomed to some Sisyphean fate, bound forever to enforce and interpret a preexisting decree without occasionally pausing to question whether changing circumstances have rendered the decree ... harmful to the public interest.”). Courts have consistently held that the public interest is served where injunctions or orders are issued to stop government officials and entities from violations of the law, particularly in regard to constitutional and statutory laws pertaining to civil rights, welfare and medical benefits, and other rights, including Medicaid. *Camacho v. Texas Workforce Comm'n*, 326 F. Supp. 2d 794,

802 (W.D. Tex. 2004) (quoting *Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801 (N.D. Tex. 1991), *aff'd*, 970 F.2d 82 (5th Cir. 1992)) (“[T]he public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve.”); *Kansas Hosp. Ass’n v. Whiteman*, 835 F. Supp. 1548, 1553 (D. Kan. 1993) (finding where “the effect of a temporary restraining order would be to enforce the federal law and regulations governing the Medicaid program [that it] would clearly be in the public interest”).

C. Plaintiffs May Seek Modification Under Rule 60(b)(5).

While most cases that approve modifications under Rule 60(b) involve defendants who wishes to terminate their obligations under a consent decree or remedial order, courts have also recognized that Rule 60(b) is a two way street that allows for the imposition of further remedial measures proposed by plaintiffs, so long as those measures serve the underlying purpose and goals of the remedial order. *Judicial Watch, Inc. v. Adams*, No. 3:17-CV-00094-GFVT, 2020 WL 5412476, at *8 (E.D. Ky. Sept. 9, 2020) (extending period of court oversight by five years in order to ensure meaningful time to assess state defendant’s compliance with federal voter law where “due to Defendants’ delayed actions” Plaintiffs were not able to sufficiently monitor voter registration and roll purging in order for court to determine compliance in the time frame originally contemplated in the consent decree). As the Court of Appeals for the District of Columbia stated: “We have previously recognized that a court” has a duty and “the authority to prevent evasion and ensure effectuation of the order it entered” so long as the “fortification of the injunction's terms [are] in service of the consent decree's original ‘intended result.’ ” *Salazar by Salazar v. D.C.*, 896 F.3d 489, 498 (D.C. Cir. 2018) (where the requested modification is reasonably calculated to enforce the operative terms and goals of the original decree, such an order does not fall outside the Court’s authority under Fed. R. Civ. P. 60(b), but denying a

modification that sought to incorporate new rights from a new statute that post-dated the decree).

When the status of a defendant's compliance is unknown, more information is needed in order to determine the current state of defendant's compliance and allow the court to make a determination of whether the underlying purpose and goals of the remedial order have been served. *See, LaShawn A. ex rel. Moore v. Fenty*, 701 F. Supp. 2d 84, 98 (D.D.C. 2010), *aff'd sub nom. LaShawn A. ex rel. Moore v. Gray*, 412 F. App'x 315 (D.C. Cir. 2011) (denying defendant's motion to modify that sought to diminish court monitor's scope of duties where changes in circumstance were foreseen and goal of decree has yet to be fully realized); *Judicial Watch, Inc.*, 2020 WL 5412476, at *5 (granting plaintiffs' motion for modification and enforcement of consent decree where extension of expiration date was necessary to ensure goal of achieving and maintaining accurate voter registration lists). Thus, some amount of continued oversight, through monitoring, increased reporting, or other means, is often necessary and proper in order to determine whether a defendant's efforts have achieved the purposes and goals of the remedial order.

VI. The Court Has the Authority Under Rule 60(b)(5) to Modify The Terms of its Judgment.

A. *The Defendants' Failure in 2012 to Achieve Compliance within the Anticipated Five Year Term, their Repudiation in 2018 of the Joint Disengagement Measures and their Refusal to Agree to Continue Monitoring and Reporting Constitute Changed Circumstances Warranting Modification.*

As discussed above, the Supreme Court has emphasized the importance of flexibility in modification of long-standing consent decrees and injunctions, and has approved modifications based upon a range of changed circumstances, where such revisions will promote compliance with federal law and further the public interest. *Rufo*, 502 U.S.at 450; *see also Boston Chapter*,

NAACP, Inc., 295 F. Supp. 3d at 30 (ordering modification of consent decree and concluding that “the ‘flexible standard’ in Rule 60(b) applies to consent decrees”).

Here there are two distinct but related set of facts – one in 2012 and the other in 2018 – which constitute good cause and changed circumstances that warrant modification of the Judgment. First, in June 2012, the Court found that the defendants had not achieved substantial compliance with all provisions of the Judgment within the five-year timeline projected by the Court and the parties. As a result, it extended the term for monitoring and reporting, with the assent of all parties, in what it termed “an agreed-to modification of the Judgment,” while the parties developed exit criteria and the defendants sought to achieve compliance with the Judgment. Then in 2018, after agreeing to the Joint Disengagement Measures that set the standard for compliance, the defendants repudiated the Measures, refused to agree to additional extensions of monitoring and reporting, and moved for a finding of substantial compliance with the Judgment, which the Court denied. These changes in circumstances, and the parties’ inability to arrive at an alternative exit strategy, has dramatically altered this final phase of the litigation, the complexity of anticipated motion practice, and the range of substantive issues at stake. The circumstances surrounding this change require a flexible approach to modification of the Judgment’s monitoring and reporting provisions, in order to support the Court’s adjudication of compliance and ensure that underlying federal law violations have been cured.

In keeping with the briefing schedule approved by the Court, Doc. 908, it must now adjudicate two critical and highly-disputed motions, the outcome of which could determine whether active oversight of the Judgment comes to an end. It undertakes this task following formal transfer of the litigation in 2019, and without the benefit of substantive briefing or

reporting by the defendants for more than two years. Further, these motions are presented in the context of a February 2019 District Court opinion finding noncompliance with its remedial order and unresolved violations of the same federal law that the Judgment was meant to remedy. Doc. 877 at 4-6. 45. Proceeding under these circumstances without the Judgment’s monitoring and reporting provisions in place would unduly burden the Court and be detrimental to the interests of class members and to the public at large. *Horne*, 557 U.S. at 453 (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’”).

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 and in compliance with federal law. *Rufo*, 502 U.S. at 391. The remedial plan’s monitoring and reporting provisions were specifically designed to assist the Court with its oversight of implementation efforts, its analysis of compliance, and its enforcement of the Judgment. Doc. 367-2, ¶48. The Court clearly envisioned having the Monitor at its disposal when the time came to evaluate defendants’ assertions that implementation had been completed, and compliance with the Judgment achieved, calling the Court Monitor’s assistance “essential” to the exercise of its authority.¹⁵ It repeatedly entered extensions of this provision for that very reason, while at the same time working to ensure that the purpose of the Judgment was achieved through the disengagement process. Given the significant change in circumstances caused by the failure to achieve timely compliance in 2012 and for many years thereafter, as well as by their repudiation

¹⁵ See February 7, 2019 Memorandum and Order:

[n]o dispute exists that the court retains core jurisdiction until implementation of the judgment and remedial order is completed. Further assistance from the Court Monitor is essential, on a reduced level, to exercise this authority. Without this minimal help, the court would be blind -- unable to discern, let alone rectify, failure to comply.

Doc. 877 at 43.

of a joint disengagement process in 2018 and the resulting need to adjudicate compliance with the entire Judgment, ordering a temporary, focused, extension of the monitoring and reporting timelines to assist the Court in assessing the facts relevant to these motions is consistent with the requirements of Fed. R. Civ. P. 60(b). *See United States v. City of Portsmouth*, 2016 WL 5477571, at *2 (D.N.H. Sept. 28, 2016) (changed facts merited an extension of the schedule for sewer upgrades where the proposed schedule was suitably tailored to accommodate the changed facts). *Judicial Watch, Inc. v. Adams*, 2020 WL 5412476, at *8 (E.D. Ky. Sept. 9, 2020) (extending period of court oversight by five years in order to ensure meaningful time to assess the state defendant's compliance with federal voter law, "due to Defendants' delayed actions").

B. The Plaintiffs' Proposed Modification of Monitoring and Reporting Provisions Is Suitably Tailored to the Current Change in Circumstances and Reasonably Calculated to Achieve its Purpose.

Cognizant of the legal standard for modification described in Section V, *supra*, the Plaintiffs' Proposed Order for Modification of Court Monitoring and Reporting is suitably tailored to the challenges created by the change in circumstances, the current litigation posture, the demands of the parties' briefing schedule (Doc. 908), and the timeframe in which these judicial monitoring and enforcement tools are most needed by the Court. This focused, time-limited extension of monitoring and reporting provisions is reasonably calculated to achieve its purpose – informing judicial review of the parties' motions and specifically the Court's evaluation of facts and evidence surrounding the necessity of proposed modifications to, and the status of compliance with, the Court's Judgment.

In their October, 2020 Status Report, the plaintiffs' re-affirmed their position that the defendants had thus far failed to demonstrate compliance with the following provisions of the Judgment:

(1) the conduct and implementation of a clinical assessment process, and the use of the Child and Adolescent Needs and Strengths (CANS) instruments in various settings (§§13-16); (2) the provision of timely and clinically appropriate Intensive Care Coordination and treatment planning, even if done through outpatient therapy (§§19-30); (3) the provision of timely and clinically appropriate covered home-based services, including Crisis Management, In Home Therapy, Therapeutic Mentoring, and In-Home Behavior Therapy (§§31-33); and (4) monitoring and implementation, including the development and maintenance of a service delivery network with the capacity to provide medically necessary services in a timely fashion (§§12, 34, 35, 37, 38, 43).

Doc. 906 at 2; *see also* Plaintiffs Opposition to Defendants’ Motion for Substantial Compliance, Doc. 857 at 11-36.¹⁶ Additionally, the plaintiffs maintain that the defendants have failed to demonstrate the existence of a durable remedy, a prerequisite to any termination of judicial oversight of the Judgment. Doc. 857 at 36-40; *see also Horne*, 557 U.S. at 450 (absent a showing of compliance with federal law and attainment of the objectives of a remedial order, termination would be inappropriate).

As noted in section II, *supra*, and as evidenced by the filings preceding this Court’s hearing on the defendants’ 2018 Motion for Compliance, these disputes are highly fact specific. They turn, in significant part, on the interpretation of complex systemic information and data collection efforts by third parties, including CANS assessment administration, Medicaid claims and utilization data, provider network capacity, waiting lists, crisis services reports, and adherence to professionally acceptable clinical practice and remedial service requirements. Importantly, there are also the experiences of youth and families and the barriers they face when trying to access timely, medically necessary services required by the Medicaid Act.

¹⁶ The Supreme Court has made clear that the defendants have the burden of proving substantial compliance with a remedial order entered by a court to correct a federal law violation. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“The school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation.” (emphasis added)); *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 978 F.2d 585, 588 (10th Cir. 1992). The defendants’ 2018 Motion, Memorandum, Statement of Material Facts (SMF), and supporting affidavits (Docs. 848-852) effectively conceded this point, in the defendants’ effort to prove substantial compliance with the Judgment. *See* Defs’ Mem. 30-33 (“the Court should now, based on the substantial compliance showing, [terminate monitoring and reporting]”).

While the Court Monitor was afforded some limited access to program staff and implementation data during the pendency of the appeal, the plaintiffs have not met with the defendants to discuss implementation of the Judgment since early in 2018. Exchange of data has been limited to standing monthly reports. The defendants have not provided any written report to the Court on the status of implementation since August of 2018. Given these circumstances, and the number of issues in dispute, re-appointment of the Court Monitor, with a focus on informing the Court's evaluation of compliance and durable remedy, is suitably tailored to cure the issues created by the changed circumstances, and to the Judgment itself. Plaintiffs' Proposed Order for Modification of the Judgment, attached as Exhibit 1, would reappoint the Court Monitor during the pendency of the parties' briefing schedule and until such time as this Court has adjudicated the motions identified therein, unless otherwise extended by the Court to ensure achievement of the goals of the Judgment. Plaintiffs propose that her appointment be focused on activities intended to support and inform the Court's analysis of: (1) the evidence of compliance with the Judgment, including interpretation of data and system performance measures like the Massachusetts Program Review (MPR); (2) the necessity of further modification to achieve the objectives of the Judgment; and 3) any further remedial orders which may flow from these decisions. This approach is consistent with the parties' prior agreements to reduce the Monitor's budget to part-time, and to focus her monitoring efforts on the Joint Disengagement Measures, demonstrating that such a tailoring is feasible without undermining the Court Monitor's work or her role as an independent agent of the Court. Most importantly, it is consistent with the purpose and role set out for the Court Monitor in the Judgment itself.

With regard to reporting, the Proposed Order for Modification of the Judgment envisions the following: (1) that the defendants would produce updated data, reports and other

implementation information requested by the Court Monitor in order to perform her duties during the briefing period; (2) that the Monitor could independently collect and assess other information relevant to compliance with the Judgment; (3) that all information reported to or collected by the Court Monitor will be produced to the plaintiffs' counsel as well; and (3) that the defendants produce to the Court Monitor and the plaintiffs any other data or documents that is relevant to their compliance with each provision of the Judgment that is in dispute.

VII. Conclusion

The Court should find there is good cause to modify its Judgment under Paragraph 50, and reinstate the monitoring and reporting requirements of the Judgment. In the alternative, it should find that there are changed circumstances warranting modification under Fed. R. Civ. P. 60(b)(5), and that reinstating the monitoring and reporting provisions of the Judgment would serve the public interest. The Court should enter the attached Proposed Order for Modification of the Judgment temporarily extending monitoring and reporting until compliance with the Judgment can be adjudicated, and any underlying violations of federal law remedied.

Dated: November 9, 2020

RESPECTFULLY SUBMITTED,
BY THEIR ATTORNEYS,

/s/ Steven J Schwartz
Steven J. Schwartz (BBO#448440)
sschwartz@cpr-ma.org
Cathy E. Costanzo (BBO#553813)
ccostanzo@cpr-ma.org
Kathryn Rucker (BBO#644697)
krucker@cpr-ma.org
Center for Public Representation
22 Green Street
Northampton, MA 01060
(413) 586-6024

Daniel W. Halston (BBO # 548692)
daniel.halston@wilmerhale.com
Kevin Palmer (BBO#698747)
Kevin.palmer@wilmerhale.com
Wilmer Hale, LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Frank Laski (BBO#287560)
fjlaski@gmail.com
154 Oliver Road
Newton, MA 02468
(617) 630-0922

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2020, I electronically filed the foregoing document using the CM/ECF system. I certify that the counsel of record are registered as ECF filers and that they will be served by the cm/ecf system to: Daniel J. Hammond, Daniel.Hammond@mass.gov and Douglas Martland, Douglas.Martland@mass.gov

/s/ Steven J. Schwartz
Steven J. Schwartz