

**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’ MOTION TO MODIFY THE JUDGMENT  
TO INCORPORATE OUTPATIENT THERAPY**

The plaintiffs hereby request that this Court modify its July 2007 Judgment to ensure that *Rosie D.* class members receive adequate service coordination, regardless of the entity defendants designate to provide this service. The plaintiffs’ proposed modification would include outpatient therapists within the Judgment’s definition of a “care manager,” and would obligate them to perform the same basic service coordination activities for which care managers are already responsible. Judgment at ¶¶ 20-29. In support of this proposed modification, the plaintiffs state as follows:

1. This Court’s 2006 liability decision concluded that effective service coordination was critical for children with Serious Emotional Disturbance (SED), and should be carried out by a “properly-trained and empowered person” in order to ensure the benefits of treatment planning are actually realized. *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 31 (D. Mass. 2006). The Court described the necessary elements of effective service coordination (*Id.* at 38), and the “devastating consequences” when this service is unavailable to children who need it. *Id.* at 39.

2. In keeping with these findings, a central purpose of the Court’s Remedial Order was to make service coordination available to all Medicaid-eligible youth with SED, since the absence of this service for most class members was “one of the major shortcomings in Defendants' Medicaid service network” and “at the root of the court's finding that a violation of the Medicaid statute had occurred.” *Rosie D. v. Patrick*, 497 F. Supp. 2d 76, 79 (D. Mass. 2007). Detailed criteria for the provision of service coordination were adopted in the Court’s final Judgment, including the roles and responsibilities of a “Care Manager.”<sup>1</sup>

3. However, the defendants departed from the Court-ordered Judgment by expanding the list of providers expected to deliver service coordination to class members with SED to include Intensive Care Coordinators, In Home Therapy (IHT) providers, and traditional outpatient therapists. As discussed in the plaintiffs’ supporting Memorandum, this decision resulted in a significant, material change in the Court’s Remedial Plan – one which left thousands of youth with SED reliant on traditional, office-based outpatient therapy for access to, and coordination of, medically necessary home-based services.<sup>2</sup>

4. Subsequent studies conducted by the defendants, their managed care agents, and the Court Monitor, all reflected outpatient therapists’ limited ability to make appropriate referrals to remedial service providers, to communicate adequately with collateral providers, schools, and state agency staff, and to effectively coordinate service delivery.<sup>3</sup> Although the parties negotiated a series of actions designed to improve care coordination for class members relying

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<sup>1</sup> These criteria are enumerated under Section C of the Judgment, titled “Intensive Care Coordination and Treatment Planning.”

<sup>2</sup> See Doc. 723 at 5-6, 8 n. 6, Plaintiffs’ Proposal on Outpatient Therapy.

<sup>3</sup> See, e.g., Doc. 695 at 6-8; Plaintiffs’ 27th Status Report; Doc 723 at 5-6, Plaintiffs’ Proposal on Outpatient Therapy; Doc. 740, Plaintiff’s Report on Appropriate Service Coordination in Outpatient Therapy; and Doc. 751, Plaintiffs’ 32nd Status Report.

on outpatient therapists,<sup>4</sup> the defendants refused to incorporate these enhancements into the 2007 Remedial Order, prompting the plaintiffs to seek modification by the Court.

5. In response to the plaintiffs' 2017 Motion to Modify and Incorporate Provisions on Outpatient Therapy, the Court affirmed the importance of adequate service coordination, calling it "critical, regardless of what label (Outpatient Therapy or otherwise) is placed upon the program component that will carry it out." Doc. 815 at 2. However, it concluded that formal modification was not necessary, given ongoing disengagement efforts and the Court's equitable authority to oversee the Judgment, and denied the motion without prejudice. *Id.* at 3. Since that decision, the need for such a formal modification has become increasingly clear. The defendants failed to achieve, and then repudiated, the Joint Disengagement Measures and their limited reference to Outpatient Therapy and, more significantly, the First Circuit concluded that a formal modification to the Judgment was necessary if requirements like Outpatient Therapy were to be binding and enforceable. *Rosie D. v. Baker*, 958 F.3d 51, 59 (1st Cir. 2020).<sup>5</sup>

6. As set out in the Plaintiffs' supporting Memorandum, the Court has the explicit authority to modify its Judgment for good cause under Paragraph 50 of the Judgment. The Court also has the general authority to modify its remedial order pursuant to Fed. R. Civ. P. 60(b)(5).

7. The defendants' unilateral decision to use Outpatient Therapy to provide service coordination for class members with SED, and to make access to other remedial services contingent on having a service coordinator in place, constitutes a significant change in fact, justifying modification. The plaintiffs' proposed modification is tailored to address the persistent, negative effects of that change, and to remedy the resulting denial of adequate service

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<sup>4</sup> See Doc. 740 at 5, Plaintiffs' Report on Appropriate Service Coordination in Outpatient and In-Home Therapy Services.

<sup>5</sup> Plaintiffs' renewed Motion for Modification (Doc. 847) was similarly denied without prejudice in March of 2019, having been preempted by the defendants' First Circuit Appeal. Once again, the Court noted the strength and "force" of the plaintiffs' arguments. Doc. 881 at 4, 6.

coordination. It works within the existing remedial framework to clarify that outpatient providers tasked with the delivery of service coordination to youth with SED must perform the same basic activities outlined for “Care Managers” under the Judgment.

8. Modification is necessary to effectuate a central purpose of the Judgment by ensuring all class members with SED can receive adequate service coordination, regardless of which provider performs this vital function. Additionally, formal modification will provide the Court with clear authority to oversee and monitor compliance with these standards. Continuing to enforce the Court’s Judgment, without a modification incorporating Outpatient Therapy, would be detrimental to the public interest, and perpetuate the inequity experienced by class members who need, but are not receiving, appropriate access to and adequate coordination of, remedial services.

WHEREFORE, for the reasons set forth in the accompanying Memorandum, the Court should amend the Judgment by adding the following footnote after the word “Care Manager” in Section C, page 19:

The definition of Care Manager includes any professional who serves as the primary service coordinator in Intensive Care Coordination, In Home Therapy or Outpatient Therapy. All Care Managers are required to perform the roles and responsibilities described in paragraphs 20-29, to the extent medically necessary, including referral to, and coordination of, covered services described in Section D.

December 21, 2020

RESPECTFULLY SUBMITTED,

THE PLAINTIFFS,  
BY THEIR ATTORNEYS,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on December 21, 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](mailto:Daniel.Hammond@mass.gov) and Douglas Martland, [Douglas.Martland@mass.gov](mailto:Douglas.Martland@mass.gov)

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