No. 19-1262
Consolidated with No. 19-1767

United States Court of Appeals
For the First Circuit

ROSIE D., by her parents John and Debra D.; TYRIEK H., by his mother Christine H.; JOSHUA D., by his mother Emelie D.; SHEENA M., by her mother Deborah D.; DEVIN E., by his grandmother Barbara E.; ANTON B., by his mother Lisa A.; SHAUN E., by his grandmother Jacquelyn E.; JERRY N., by his mother Susan P. on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees

NATHAN F., by his mother Tracey F.; SAMUEL L.; JOSE M.; TERRENCE M.; MARC ST. L; NATISHA M.; SARAH B.; FORREST W.; JASON S.; SHENTELLE G.; CHRISTINE Q.; KRISTIN P.; CHRIS T.;CHELSEA T.; RALPH B.; TEVIN W.; DANIELLE H.; JANICE B.; KRISTIN H.,

Plaintiffs,

v.

CHARLES BAKER, Governor of Massachusetts; MARYLOU SUDDERS, Secretary of the Executive Office of Health and Human Services; MICHAEL HEFFERNAN, Secretary of the Executive Office of Administration and Finance, DANIEL TSAI, Assistant Secretary for Mass Health

Defendants - Appellants

On Appeal from an Order of the United States District Court
for the District of Massachusetts

BRIEF OF THE PLAINTIFFS-APPELLEES

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Corporate Disclosure Statement

Pursuant to Rule 26.1(a) of the Federal Rules of Appellant Procedure, the plaintiff-appellee, the Center for Public Representation states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and is not a publically held corporation that issues stock. It has no parent corporation.

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JURISDICTIONAL STATEMENT

This Court lacks jurisdiction of the initial appeal (No. 19-1262) under 28 U.S.C. § 1292(a)(1), because the District Court's February 7, 2019 Order was not an injunction; did not continue, modify, or terminate an injunction; and could otherwise be challenged by a motion under Fed. R. Civ. P. 60(b)(5), as the District Court noted. Add. 78-79, n.14.

First, the Order did not continue an injunction in a material way. The defendants' 2012 notice of compliance and subsequent 2018 Motion to Terminate only sought to end the monitoring and reporting provisions of the Judgment, not to vacate the Judgment nor terminate any other provisions of the remedial order. Add. 62 (noting that in their 2012 notice of compliance, defendants only sought an end to monitoring, not a termination of the Court's Judgment), 81 ("no dispute exists that the court retains core jurisdiction until implementation of the judgment and remedial order is completed"). The District Court's authority to supervise and enforce its original 2007 Judgment was unaffected by the Order and remains in place today. Add. 83 ("the court retains the power and the responsibility to continue its supervision" [of its Judgment])[1]; *Rosie D. v. Romney,* 474 F. Supp. 2d 238, 240 (D. Mass. 2007). The District Court merely refused to end the

[1] Citations to the Addendum filed as part of Defendants' Brief are Add., with page references to the numbers in the Appendix, not the original document. Citations to the five-volume Appendix are App., with pages references to the numbers in the Appendix, not the original document.

monitoring and reporting provisions of its Judgment, which does not constitute a "serious, perhaps irreparable, consequence" to the Commonwealth. *Carson v. American Brands,* 450 U.S. 79, 84 (1981) (statute construed narrowly consistent with congressional policy against piecemeal review); *King v. Greenblatt,* 52 F.3d 1, 3 n.4 (1st Cir. 1995) (absent such conditions, court of appeals does not have § 1292 jurisdiction); *Ricci v. Okin,* 978 F.2d 764, 765-66 (1st Cir. 1992) (no jurisdiction under § 1292 because challenged order did not contemplate an expiration date or continue the injunction).

Second, the Order did not modify the Judgment. *See Morales Feliciano v. Rullan*, 303 F.3d 1, 7 (1st Cir. 2002) (change is jurisdictionally significant if it substantially readjusts the legal relations of the parties, and does not relate simply to the conduct or progress of litigation). If there was any modification to the Judgment concerning a timeframe for monitoring and reporting, it was done by the District Court's March 20, 2012 Order. App. 632-34. In any event, under *Morales,* the February 7, 2019 Order did not "substantially readjust the legal relations of the parties" since it merely continued the agreed-upon reporting requirements under the Judgment. *See also Sierra Club v. Marsh*, 907 F.2d 210, 213 (1st Cir. 1990) (subsequent order did not have immediate effect, and did not "change the command of the earlier injunction, relax its prohibitions, or release any respondent from its grip").

Finally, defendants remain free to challenge the District Court's reliance upon their own 14-day promptness standard by filing a motion under Rule 60(b)(5), thereby ensuring that there is no "irreparable consequence" to the Order. Therefore, this Court lacks jurisdiction under 28 U.S.C. § 1292(a)(1) and should dismiss this appeal.

Similarly, this Court lacks jurisdiction under 28 U.S.C. § 1292(a)(1) over the second appeal (No. 19-1767), because the District Court's July 1, 2019 Order "extending the appointment of the court monitor, under her present terms and conditions of engagement, in aid of execution of the underlying judgment, unless and until the Court of Appeals orders differently," Add. 84, was not an independent injunction and did not continue, modify, or terminate an independent injunction. *Bogard v. Wright*, 159 F.3d 1060, 1063 (7th Cir. 1998) (declining to exercise appellate jurisdiction under § 1292(a)(1) over order extending court monitor). It did not "substantially and obviously alter[] the parties' pre-existing relationship." *Jones-El v. Berge,* 374 F.3d 541, 544 (7th Cir. 2004). Rather, it simply maintained the status quo pending appeal, and in order to preserve the District Court's authority to oversee implementation of its Judgment and remedial order, which remained in effect and was never stayed pending appeal. *Ricci,* 978 F.2d at 766 (remedial monitoring order does not "expire[] while the court is in the midst of [a] compliance determination"). Nor is the July 1, 2019 Order appealable

pursuant to this Court's pendent appellate jurisdiction, because: (i) it is not inextricably intertwined with one or more appealable issues or (ii) review of a non-appealable issue is essential to ensure meaningful review of an appealable issue. *Puerto Rico Ports Authority v. BARGE KATY-B, O.N.,* 427 F.3d 93, 107 (1st Cir. 2005) (citing *Swint v. Chambers County Comm'n,* 514 U.S. 35, 51 (1995)).

STATEMENT OF THE ISSUES

Whether the District Court properly denied defendants' Motion for Substantial Compliance and to Terminate Monitoring and Court Supervision based on its factual findings of noncompliance with its Judgment and with the reasonable promptness and EPSDT provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(8), 1396a(43), and 1396d(4)?

Whether the District Court properly relied upon defendants' 14-day timeliness standard for providing Intensive Care Coordination (ICC), which the Commonwealth developed pursuant to federal law, 42 C.F.R. § 441.56(e), in order to determine that defendants had failed to cure longstanding and persistent Medicaid violations?

Whether the District Court properly determined that defendants had agreed to modify the Judgment's five-year time frame for monitoring and reporting, and then incorporated that agreement in its March 20, 2012 Order, App. 632-34, from

which defendants never appealed and which defendants repeatedly agreed to, extend for the following six years?

STATEMENT OF THE CASE

A. The Court's Findings on Violations of the EPSDT and Reasonable Promptness Provisions of the Medicaid Act Concerning Care Coordination.

In its initial liability decision, the District Court concluded that the Commonwealth was violating both the EPSDT and reasonable promptness requirements of the Medicaid Act. *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 23, 53-54 (D. Mass. 2006). Among the Court's[2] key findings was that youth with Serious Emotional Disturbance (SED) did not have reasonably prompt access to medically necessary home-based services, including effective service coordination. *Id*. at 38, 52-54.[3]

During a lengthy bench trial, the Court heard evidence of the harms experienced by youth and families who went without effective coordination of medically necessary home-based services, including "expensive, clinically unnecessary and damaging confinement in a long-term residential program or

[2] Hereafter, "the Court" refers to the District Court unless otherwise indicated.
[3] "Children with SED are particularly challenging to treat because of the severity of their needs and the number and intensity of services they require. The danger for these children, given their complex problems, is that they will not only receive insufficient services, but that a lack of coordination among the service providers will undermine the effectiveness of the treatment that they do receive." *Rosie D.*, 410 F. Supp. 2d 18 at 32.

hospital, far from home and family." *Id*. at 53. The Court found it "impossible to overstate the importance of active informed case management" for youth with SED, from identifying appropriate programs and services, to formulating and coordinating implementation of the child's treatment plan. *Id*. at 38-39, 52.[4] Although some children, in three pilot programs, had access to this kind of wraparound care coordination, it was not available with reasonable promptness to all youth for whom the service was medically necessary. *Id*. at 30, 38-40.

B. The Court's Judgment.

The Court's January 26, 2006 liability decision directed the parties to negotiate a joint remedial order. *Id*. at 54. After failing to reach agreement, the parties each submitted proposed remedial plans. Add. 10. The Court chose to enter defendants' plan, with several changes described in Orders dated February 22, 2007, *Rosie D. v. Romney*, 474 F. Supp. 2d 238, 239-241 (D. Mass. 2007), and July 16, 2007, *Rosie D. v. Patrick,* 496 F. Supp. 2d 76 (D. Mass. 2007). Add. 1-9. A central component of the Judgment and remedial plan was a new program to provide care coordination – termed Intensive Care Coordination or ICC. If implemented effectively, and consistent with professional standards, ICC could

[4] "[C]entralized, knowledgeable, and painstaking service coordination is essential; without it, a child's life becomes a chaos of ineffective, overlapping plans and goals." *Id*. at 31.

cure the EPSDT and reasonable promptness violations described in its liability decision. Add. 20-23, 30-31 (program requirements for ICC).

Although few in number, the Court's modifications to defendants' remedial plan were significant. For instance, the Court rejected the following provisions proposed by defendants: (1) discretion to unilaterally modify any provision of the plan; (2) a drop dead date for termination of the Court's authority to enforce or modify the Judgment; and (3) limiting enforcement of the Judgment to only those actions that are explicitly required by the language of the EPSDT or the reasonable promptness provisions of the Medicaid Act. App. 18, 27; Add. 2.

In reaching its decision on remedies, the Court directed that modification may occur only for good cause, by order of the Court, or by agreement of the parties. Add. 2. The Court also declined to end its enforcement and modification authority on a date certain, referencing its obligation to ensure full implementation. Add. 8. 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." Add. 7. The Court concluded that it had "the responsibility to [e]nsure that Defendants take whatever actions are reasonably necessary to remedy the violations found in its judgment on liability. Obviously, some of these measures may not be spelled out

in the EPSDT and 'reasonable promptness' provisions of the Medicaid statute." Add. 7-8.

In adopting the remainder of defendants' remedial plan, which included the appointment of a Court Monitor, Add. 27, the Court noted that "respect for the sovereignty of the Commonwealth and the competence of its officials requires the court to allow the state to demonstrate that its chosen remedial plan will address, promptly and effectively, the Medicaid violations identified by the court." *Rosie D.*, 474 F. Supp. 2d at 239. However, it cautioned that, "deference is not infinite; the court will not be obliged to close its eyes to unreasonable delays or inadequate measures. *Id.* The defendants did not appeal either of the Court's 2007 Orders or the final Judgment, entered on July 16, 2007.

C. Plaintiffs' 2010 and 2011 Noncompliance Motions.

Defendants were required to develop a home-based service system, including program specifications for each remedial service and time frames for the provision of services to class members.[5] Add. 30-31. Although the Judgment did not prescribe the contents of these program specifications, it did establish specific timelines for their completion and implementation, including reports to the Court.

[5] The program specifications were submitted to CMS as part of its review of the State Plan Amendments for these services, and are subject to federal audit. The program specifications describe how the new services are delivered, the required qualifications of staff, and the various time frames within which care and treatment must be delivered. All providers are required to comply with these standards by contract. Add. 30.

Add. 30-31. The defendants' program specifications for ICC specifically required that youth and families be offered an initial appointment within three days of confirming their interest in the service.[6] App. 150, 159.

Home-based services became available to class members in the Fall of 2009, and defendants held their ICC providers accountable to the 3-day timeliness standard set out in the ICC Program Specifications. App. 159, 365. However, by early 2010, reports of lengthy waiting lists and a lack of reasonable promptness in the delivery of ICC were presented to the Court by plaintiffs and the Court Monitor. App. 39-42, 48-49. At the Court's request, in June 2010, plaintiffs filed a Proposed Order on Waiting Lists, App. 32-33, followed by a motion for noncompliance alleging failure to provide ICC within the State's own promptness standard. App. 43-45. The supporting memorandum presented defendants' data documenting average wait times for an initial ICC appointment at 21.5 days in July 2010, together with numerous affidavits describing the harm to children from lengthy delays in accessing ICC. App. 50-56, 68, 70-75, 76-79, 83-87, 93. Ultimately, the Court concluded that more information was required to understand

[6] The defendants themselves decided to require that ICC services are available within a matter of days, because prompt access to this type of service is critical for the health and safety of needy children. That the Judgment required the development of another service, called Mobile Crisis Intervention (MCI), which must be available within one hour, in no way diminishes the importance of timely ICC services, as defendants now appear to suggest. Defs' Br. 27, n. 12, 44, n.18.

the "magnitude of the problem," so it ordered that the parties collect, analyze, and report additional data on timely access to ICC. App. 276-77, 288-89.

On September 12, 2011, plaintiffs filed a Supplemental Motion and Memorandum to ensure reasonably prompt access to ICC, accompanied by a revised, proposed order. App. 290-309. On October 8, 2011, the Court stated its intent to issue an order ensuring reasonably prompt access to ICC. App. 375, 400, 420. However, rather than adopt plaintiffs' proposed timeframe of seven days, or impose its own standard, the Court directed defendants to submit a proposed order and stated "I'd like to see the defendants' proposal for what my order should be, because … you're not just technically out of compliance, you're substantially out of compliance and I have to do something." App. 422-23. Subsequent briefing from defendants and plaintiffs laid out undisputed evidence of noncompliance with the 3-day standard, including that 15% of youth waited more than 30 days for an initial appointment with an ICC provider. *See, e.g.,* App. 311-12, 330-31, 359-60.

On November 29, 2011, the Court issued its Memorandum and Order, granting plaintiffs' motion (in part). App. 434-35. In response to defendants' request to modify the 3-day standard for ICC services, the Court directed the parties to meet with the Court Monitor, discuss defendants' proposal for a new reasonable promptness standard, and report back to the Court. *Id.* Additionally, the Court ordered defendants to "[e]ffectuate management strategies specifically

targeting the reduction, and ultimately the elimination, of waiting lists for ICC services, including strategies outlined in their Supplemental Memorandum (Dkt. No. 551)," and "include in their January 13, 2012 report a summary of their progress in this area." *Id*. at 435. The Court intended to use this report to "consider the necessity of setting firm deadlines for bringing these times in better compliance with the court's remedial order." *Id*.

In a January 26, 2012 affidavit, defendants updated the Court on their request to the New England Council of Child and Adolescent Psychiatry (NECCAP) to "advise EOHHS on a standard for reasonably prompt access to Intensive Care Coordination," as required by federal law. App. 625. Defendants, acknowledge that "[f]ederal law requires a state to set standards for the timely provision of EPSDT services, which must meet reasonable standards of medical practice," and had sought "guidance as to an appropriate outside limit beyond which no member eligible for ICC should wait to obtain ICC -- a time period that you would consider to be reasonably prompt." App. 629.[7] NECCAP's written response and recommendation, sent in a personal email to defendants by its President, Dr. Metz, stated:

[7] In their request, defendants explained: "The Medicaid access standard will be communicated to families as well as providers, that *families have a right to receive this service within this timeframe. We are planning to add the new access standard to the contracts of the managed care entities, and we will hold them accountable for ensuring that our members have access to ICC within the time of the access standard.* App. 628 (emphasis added).

> The Board recommends that an outside limit of 10 business days between the time of request for ICC and the first meeting with ICC staff to establish enrollment be instituted. The current 3 day limit should be adhered to whenever possible, recognizing that there is evidence that engagement in services is most likely to occur if the response to a request can occur as soon as possible after the need is first expressed.

App. 630-31.

The State did not adopt the "outside limit" of its federally-required professional recommendation. Instead, defendants proposed 14 calendar days as the Medicaid standard for the initial ICC appointment. App. 493, 502. The defendants justified their deviation from the NECCAP professional recommendation saying:

> [W]e're really hearing clearly from the providers that the three-calendar days . . . is really, really hard to deal with. So we are suggesting 50 percent by five calendar days, 75 percent by ten calendar days, with the remaining within the two-week period.

App. 502.

On March 20, 2012, the Court expressed concern about maintaining progress on implementation and avoiding backsliding, worried that shifting from a 3-day to a 14-day Medicaid access standard could mean the system was "moving in the wrong direction." App. 637. At the same time, the Court stated its inclination to "adopt the defendants' proposed standards and then say, okay, this is the standard you've proposed. Comply with it." App. 637-38. The Court would require regular reports from the defendants to measure if youth were being offered

appointments within the graduated time periods proposed. App. 639. The defendants assured the Court that "a Medicaid access standard is a standard that a Medicaid program takes seriously and believes that needs to be in substantial compliance with." App. 651. Significantly, defendants did not object to the idea of a proposed order memorializing the 14-day Medicaid access standard, or additional reporting on compliance with that reasonable promptness standard. [8] App. 651-52, 655, 676-78.

Following the status conference, the Court issued a Memorandum and Order Regarding ICC Access Standard:

> [t]he court approved a fourteen-day access standard for Intensive Care Coordination ("ICC") access. This means that no more than fourteen days will elapse between the initial contact with the ICC provider and the first offered date for a face-to-face meeting. The court approved this standard with the understanding that the contractual obligations of the ICC providers as contained in their performance specifications would require that the period be three days for at least 50% of the clients, ten days for 75% of the clients, and no more than fourteen days for 100% of the clients. The court will be monitoring data regarding access carefully to insure that the approval of the more generous standard does not result in longer delays.

App. 632-33 (the "March 2012 Order").

The defendants never appealed this Order. Over the next six years, they did not challenge or object to the appropriateness of the 14-day standard as a measure of reasonably prompt access to ICC. *See, e.g.,* App. 1164-65, 1169, 1205-06,

[8] Defendants also acknowledged that they had yet to meet that 14-day standard in a year and a half of implementation, but believed they were close to doing so, with "concerted effort." App. 652.

1210. Even Defendants' Memorandum Regarding Substantial Compliance and Statement of Material Facts, submitted in support of its 2018 Motion, reported on its level of compliance with the 14-day standard. App. 1516, 1537-38.

D. Defendants' 2012 Submission of Compliance and Position on Monitoring and Reporting.

Although the Judgment provided that reporting and monitoring would terminate within five years, the Court's July 16, 2007 Order explicitly reserved the authority and discretion to extend its oversight until the Judgment was fully implemented. Add. 8. In early 2012, the Court suggested the need for continued monitoring and reporting beyond the five-year deadline, given plaintiffs' recent motions for noncompliance, the absence of crisis stabilization, and documented deficiencies in the delivery of ICC services with reasonable promptness. App. 485-86; 635-41 ("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."). On March 20, 2012, defendants consented to such an extension in open court: "we really don't 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." App. 650. The Court later summarized its intention to extend monitoring, implementation, and reporting to December 31 "without any

disagreement," App. 677, and memorialized this change in its March 20, 2012 Order.[9] App. 633.

As noted above, defendants never appealed that Order, which extended monitoring and reporting by agreement. Nor did they file a motion to terminate monitoring and reporting, or to specifically enforce the five-year timeline in the Judgment, until 2018. *See* Add. 38. Defendants described this as a "conscious choice," allowing the Court the option to determine whether to extend the timeline for monitoring and reporting. App. 829-30.

Despite the outcome of plaintiffs' motion for noncompliance, the Court's March 2012 Order, and defendants' concession that they were not yet providing ICC services consistent with the 14-day reasonable promptness standard, defendants' May 2012 Report on Implementation asserted substantial compliance with most aspects of the Judgment. However, defendants conceded that there were still "open items" -- activities in process or incomplete as of the date of filing. App. 789. Plaintiffs' Eighteenth Status Report challenged defendants' assessment of substantial compliance, incorporating by reference all of their data and arguments on reasonable promptness, and noting deficiencies in "screening, assessment, the delivery of Intensive Care Coordination (ICC), effective mobile

[9] The Court's Order stated, in pertinent part, "[w]ith the agreement of both sides, the period for oversight, monitoring, and reporting with regard to the Remedial Order has been extended to December 31, 2012. It is understood that funds to support the court monitor have been approved for fiscal year 2013." App. 633.

crisis and crisis stabilization services, and the monitoring of system practice, provider performance and child outcomes."[10]

Because no formal motion to terminate monitoring had been filed, because defendants acknowledged certain tasks remained incomplete, and because plaintiffs consistently contested the status of compliance, the Court relied upon the parties' agreement to extend monitoring and reporting for at least six months, and proposed they negotiate a plan for disengagement, with the goal of ending Court oversight. App. 821-22. The defendants consented to this approach. App. 826-27; Add. 64.

For the next five years, defendants filed or assented to a series of proposed orders extending the Court Monitor's appointment and corresponding budget, App. 968, 985, attended numerous status conferences, and submitted more than a dozen reports to the Court. As the Court noted in its February 7, 2019 Order, approximately 10 such Court Monitor extensions took place between 2012 and 2017, typically for six months at a time. Add. 61-62. These agreed-to extensions constituted, in the Court's view, "an obvious voluntary modification of the remedial order's oversight and monitoring provision." *Id.* at 61.

[10] App. 791-93; 290-312, 330-31, 359, 527, 530 (ICC promptness pleadings and CSA data).

E. Defendants' Actions to Comply with the Judgment (2013-2017).

The defendants worked with plaintiffs and the Court Monitor to develop a set of concrete actions designed to achieve compliance with the Judgment and the termination of monitoring and reporting. App. 977; Add. 58-66. On June 21, 2013, the parties filed their Joint Disengagement Criteria, laying out the four main areas in which further data collection, analysis, and implementation efforts would be focused: timely access, utilization, effectiveness, and quality standards/practice guidelines. App. 977-84. Progress towards the completion of these tasks was assessed by the Court Monitor, and reported to the Court, over a period of two years. App. 1001-55, 1059-1105. During this time, the Court Monitor's appointment was repeatedly extended by agreement of the parties. App. 1000, 1018, 1056-57, 1106-12.[11]

During 2015, the Court encouraged the parties to move the disengagement process forward, grapple with remaining issues of alleged noncompliance, and provide a clear pathway for achieving an effective remedy, including a means to achieve the reasonably prompt provision of ICC services. App. 1061, 1068; Add. 64-65. In late 2015, defendants acknowledged a "pervasive and lasting problem with access to services, particularly ICC and IHT" (In-Home Therapy). App.1049.

[11] *See* App. 993 ("[I]f the Court were disposed to enter an order today officially extending the monitoring reporting period for the end of June of '14, it would get no resistance from the defendants."); App. 1056-57.

As a result of this failure to achieve the qualitative Disengagement Criteria, and continuing disagreement regarding overall compliance with the Judgment, the parties negotiated and filed specific Joint Disengagement Measures, including quantitative benchmarks for assessing improvement over a two-year period. Add. 64-66.

Disengagement Measure One set standards for gradually increasing the percentage of class members who received an initial appointment for ICC and IHT within the court-ordered 14-day reasonable promptness standard.[12] App. 1205. While the parties could not agree on the exact percentage of annual improvement for Measure One, the briefing indicated no disagreement with 14 days as the appropriate standard against which to measure reasonably prompt access to ICC and IHT services. App. 1113-16, 1133-42.

The Court declined to formally order the new Disengagement Measures, believing it unnecessary to ensure defendants' continued efforts toward implementation. App. 1226-27.[13] However, it noted that:

[12] Defendants' system performance in June of 2016 became the baseline for measuring progress over time. App. 1205. At that time, only 63% of class members seeking ICC services were being offered initial appointments within 14 days. Add. 65.

[13] The Court observed: "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." App. 1152-53.

> The Joint Disengagement Measures give 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.

App. 1228.

During 2016 and 2017, defendants did not file a motion to terminate reporting or the role of the Court Monitor. Rather, the parties continued to work together with the Monitor to address systemic concerns and achieve the negotiated standards set out in the Disengagement Measures. The defendants prepared periodic reports on their efforts to achieve the Disengagement Measures and participated in regular status conferences. *See, e.g.,* App. 1117, 1150, 1163, 1170, 1189. Although continuing to characterize the Disengagement Measures as voluntary, defendants acknowledged that they defined "what disengagement looks like" and, if achieved, would result in the end of active monitoring and reporting to the Court. App. 1135, 1155-57.

Unfortunately, the incremental annual progress anticipated by the Disengagement Measures did not occur. Add. 66-67. Instead, data collected from late 2016 to early 2018 evidenced deterioration in the prompt provision of ICC and increasing waiting lists for both ICC and IHT services. App. 1459-68, 3281-83,

3351, 3353. By the fall of 2017, defendants acknowledged that the progress measure for reasonably prompt access to ICC and IHT would not be met:

> To summarize the findings of the reports, ICC did not meet the access target in any of the first seven months, and IHT met the access target for two of the first seven months. As a result of this preliminary data, Defendants will not hit the disengagement target in 9 of 12 months in calendar year 2017.

App. 1165. The defendants' compliance with their 14-day Medicaid access standard actually decreased during the first half of 2017, going from 61.64% to 50.3%. App. 1169. Throughout FY2017-18, an average of 220 youth were waiting for an initial appointment at the end of each month. During the last quarter of FY2018, 97 youth waited more than a month in April; 101 in May; and 71 in June. App. 3351, 3353.

In response to these reports, the Court pressed for "concrete steps" to remedy "excessively long" wait times for ICC, emphasizing the importance of service coordination in remedying the federal law violations found in its 2006 liability decision and its central role in the remedial home-based service system created by the Judgment:

> This is the front door to the system where people are often in crisis and children are in need, and the question of allowing children to get to the services promptly is pressing. It's important. . . . . These services have to be provided, and they have to be provided promptly, reasonable promptness. So that's my responsibility.

App. 1232, 1235.

At its April 2018 status conference, and again in June 2018, the Court expressed no confidence that such a plan was forthcoming.[14]

F. Defendants' 2018 Motion to Terminate Monitoring and Court Supervision.

On August 6, 2018, defendants filed their Motion Regarding Substantial Compliance and to Terminate Monitoring and Court Supervision. App. 1480. Despite its caption, the motion only sought to end monitoring and reporting, based upon a showing of substantial compliance, and did not move to terminate any of defendants' other obligations under the Judgment, the Court's authority to enforce the Judgment, or the Judgment itself under Rule 60(b)(5). App. 1480-81; 1514-15. It made no claim that the case should be dismissed, that the Judgment should be vacated, or even that any provision of the Judgment other than in Section I.E.3 (¶¶ 47-49) should be terminated. In fact, defendants explicitly disavowed filing their motion under Rule 60(b)(5) – the common procedural vehicle for ending a state's obligations under a systemic injunction. App. 1520 & n. 26.

Plaintiffs' Opposition recounted the history of waiting lists for ICC and IHT, resulting in problems ensuring reasonably prompt access to service coordination, and a host of other deficiencies in implementing the Judgment. App. 3279-85. The attached exhibits relied primarily on defendants' own data, documenting the

[14] App. 1349 ("Defendants were unable to identify any practical measures that would give the court reasonable assurance that these critical access problems will be promptly and effectively addressed.").

amount of time youth and families waited for an initial ICC or IHT appointment. App. 3261, 3351, 3353-55; *see* App. 3262-63, 3265-97 (addressing other areas of noncompliance with the Judgment). *See also* App. 1280 (March 2018 In-Home Therapy Availability and Waiting List Report).

In order to avoid uncertainty pending resolution of defendants' Motion, and to preserve oversight of the Judgment, the Court – once again, and without opposition from defendants – extended the Monitor's term until June 30, 2019, in an Order dated November 27, 2018. Dkt. 869 ("the court is convinced that, whatever the rulings on the two pending motions, involvement by the Court Monitor will be essential, at a minimum, to permit a smooth wind-down of the Court's oversight."). That order was never objected to or appealed.

G. February 7, 2019 Memorandum and Order.

On February 7, 2019, after extensive briefing and oral argument, App. 3461-3517, the Court denied defendants' Motion, refusing to terminate active court oversight and monitoring of the home-based service system. Add. 81-83. The Court's decision provides a detailed history of the litigation, the initial liability decision finding violations of the EPSDT and reasonable promptness provisions of the Medicaid Act, the parties' efforts to implement the 2007 Judgment, and the specific factual and legal arguments supporting its ruling. Add. 54-69.

The Court found a continuing violation of federal Medicaid law, evidenced by a long history of problems with reasonably prompt access to service coordination and resulting waiting lists for ICC and IHT. Add. 42-44, 48-52.[15] It held that "[d]efendants have so far failed to provide these clinical services to a large portion of the Plaintiff class with anything approaching "reasonable promptness," Add. 42, later noting that "[d]efendants' failure to comply with the judgment and remedial order itself, without reference to the parties' agreed upon disengagement measures, is glaring." Add. 70.

The Court rejected defendants' argument that the Judgment did not require them to deliver remedial services with "reasonable promptness," since this theory "flies in the face of the explicit liability finding, the manifest import of the remedial order, and, most importantly, the clear language of the Medicaid statute itself and the law's regulations." Add. 51, n.7.[16] Rather, the Court concluded that, "[f]ederal law and Section I(C) of the judgment require Defendants to provide care

[15] The Court observed that "placement [in] inappropriate clinical settings, such as emergency rooms or longer-term in-patient facilities due to the absence of responsive home-based services, can be extremely damaging to these fragile children and was a primary shortcoming of the pre-2006 system that the remedial order aimed to rectify." Add. 53.

[16] *See also* App. 3481-82 ("[W]hen the judgment is anchored on a finding of the reasonable promptness -- failure to comply with the reasonable promptness requirements and that you are off the hook on that because I didn't use the phrase -- or the draft judgment that was submitted to me didn't use the phrase 'reasonable promptness,' that seems to me to be a pretty tortured argument.").

coordination services for the class members 'with reasonable promptness.'" Add. 82.

In addition to a lack of timely access to ICC and IHT, the Court found that "serious concerns exist, with substantial objective verification, regarding the quality of some of the care coordination being provided[,]" including the extent to which youth in IHT or outpatient therapy are receiving care coordination consistent with the Judgment. Add. 52, 76-77. However, the Court expressly reserved any decision on other portions of Judgment, and the need for continued court monitoring, anticipating the issuance of a further order in response to plaintiffs' pending motions. Add. 44, n.5; Dkt. 869.

H. The Court's July 1, 2019 Order Extending the Appointment of the Court Monitor Pending Appeal.

Since defendants never sought a stay of the Court's February 7, 2019 Order, the Judgment – including its monitoring and reporting provisions – remained in full effect, and the Commonwealth continued to be bound by all of the affirmative obligations under the Judgment. Once defendants appealed the Court's Order, it soon became clear that the Monitor's appointment would end while the initial appeal was pending. To prevent the abrupt and inappropriate termination of the role of the Court Monitor, on June 17, 2019, plaintiffs filed a Motion to Extend the Court Monitor's Appointment (Dkt. 885) to continue court monitoring during the pendency of this appeal. The motion was necessary both to preserve the status quo

and to protect the Court's authority and responsibility to oversee its own Judgment. Unlike all ten prior extensions, defendants opposed this one. Dkt. 887. On July 1, 2019, District Court Judge Stearns carefully extended the Monitor's appointment, "under her present terms and conditions of engagement, in aid of execution of the underlying judgment, unless and until the Court of Appeals orders differently." Dkt. 889.

STANDARD OF REVIEW

Defendants argue that the standard of review should be *de novo* or plenary review. Defs' Br. at 31. This is incorrect. Where a district court finds that a government agency is not in substantial compliance with a judgment or consent decree, that finding is reviewed for clear error. *Fortin v. Commissioner of Massachusetts Department of Public Welfare*, 692 F.2d 790, 794 (1st Cir. 1982) (no clear error where court held defendant was not in substantial compliance with consent decree and affirming civil contempt finding for noncompliance). In *Fortin*, this court held that "district court findings based on undisputed facts or documentary evidence are reviewable only for clear error." *Id.* "This is true even when a mixed question of law and fact is at issue." *Id.* The standard is met only "when although there is evidence to support [the finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*

The Court's finding that defendants are not in substantial compliance with the Judgment is entitled to deference and should be reviewed for clear error. *Fortin* controls the question presented here, even if, as defendants characterize, it is a "mixed question of law and fact." To the extent this ongoing federal law violation is a fact-dominated question, as is abundantly clear from the Court's detailed analysis of the facts, Add. 42-45, 49-69, its finding should be reviewed for clear error, along the "degree-of-deference continuum." *Healey v. Spencer*, 765 F.3d 65, 74 (1st Cir. 2014) (quoting *Morales Feliciano v. Rullan*, 378 F.3d 42, 52-53 (1st Cir. 2004)).

SUMMARY OF THE ARGUMENT

From its inception through the Court's February 7, 2019 Order, this case has focused on ensuring the prompt provision of home-based services, including service coordination, in order to remedy underlying violations of the EPSDT and reasonable promptness provisions of the Medicaid Act. The Court's denial of defendants' Motion was based upon undisputed factual findings that defendants were not providing Intensive Care Coordination (ICC) and In-Home Therapy (IHT) services promptly, as required by their own standard, the Court's March 2012 order, and federal law. As a result, the Court properly concluded that defendants had: 1) not complied with the provisions and purposes of the Judgment and subsequent court orders; 2) failed to cure underlying federal Medicaid law

violations; and 3) repeatedly consented to extensions of court monitoring and reporting beyond the initial five-year timeline in the Judgment.

States are required to provide medical assistance with reasonable promptness. 42 U.S.C. § 1396a(a)(8). The Medicaid Act and its EPSDT regulations mandate that States set standards for the prompt provision of medically necessary services. 42 C.F.R. § 441.56(e). Courts properly look to the State's own standard in determining whether services are provided promptly, and in compliance with federal law.

Waiting lists and delays in access to ICC began only months after remedial services became available, prompting more than a year of briefing and data collection, and two motions for noncompliance. In early 2012, after consulting with pediatric organizations as required by EPSDT regulations, defendants proposed enlarging their standard for an initial ICC appointment from 3 to 14 days, acknowledging: 1) that they were required to establish Medicaid access standards for the provision of EPSDT services; 2) that 14 days would be the outside limit on the initial ICC appointment; and 3) that families had a right to receive care coordination services within this timeframe. Based on these representations, the Court adopted the Commonwealth's proposed standard in its March 2012 Order.

That Order constituted a modification under paragraph 50 of the Judgment. It also satisfied Rule 60(b)(5). The Court had the authority to *sua sponte* modify

its own Judgment, having provided ample notice and opportunities for the parties to be heard.

Moreover, federal courts have broad equitable authority to interpret their own orders. The defendants' reasonable promptness standard gives meaning to key obligations under the Judgment, and provides a legitimate basis for measuring whether adjudicated violations of federal Medicaid law have been cured. The Court properly determined that standard was binding.

The defendants never appealed the March 2012 Order, never questioned its enforceability, never challenged the reasonableness of their own promptness standard, and never protested the modification of the Judgment. Instead, defendants assured the Court that the Commonwealth would comply with its own Medicaid reasonable promptness standard, and expected that it would use that standard to assess compliance with the Judgment. Even the parties' Stipulation on Joint Disengagement Measures incorporated this standard as an appropriate measure of compliance with the Judgment and as the basis for ending court monitoring and reporting. As a result, the Court properly relied upon defendants' own timeliness standard when determining whether ICC and IHT services were provided promptly under the Judgment, and whether defendants were in compliance with federal law.

The Court's factual findings, based on the Commonwealth's own data, were not clearly erroneous and provide ample evidence of a persistent failure to provide services with reasonable promptness. This noncompliance was longstanding, and was in no way a "fresh" violation of the Medicaid Act. The Court properly concluded that defendants should not be relieved of judicial oversight unless and until underlying federal law violations, and the conditions which flow from those violations, have been cured.

Finally, given numerous joint motions, or in-court stipulations to extend monitoring, it was entirely reasonable for the Court to view the parties' agreements to extend monitoring and reporting as a voluntary modification of the Judgment under paragraph 50(b) of the Judgment. Moreover, the Court's finding of noncompliance with federal law and its Judgment were sufficient "good cause" to extend monitoring and reporting obligations under paragraph 50(a) of the Judgment as well as under Rule 60(b)(5). These same rationales, plus the well-established principle of preserving a court's authority over its unchallenged remedial orders, support continuing the appointment of the Monitor pending appeal which is the order at issue in the second appeal (No. 19-1762).

ARGUMENT

I. Under Federal Law, the Commonwealth Is Required to Provide Services with Reasonable Promptness.

A. The Medicaid Act Requires Defendants to Provide Services Reasonably Promptly.

The Medicaid Act requires States to provide medical assistance with reasonable promptness. 42 U.S.C. § 1396a(a)(8). Medical assistance includes both medically necessary services and payment for such services. 42 U.S.C. 1396d(a), as amended by the 2010 Patient Protection and Affordable Care Act, § 2304, 42 U.S.C. § 1396d(a). This Court, as well as others, has concluded that States are obligated to provide all medically necessary services promptly. *Hawkins v. Dep't Health & Hum. Servs for N.H.*, 665 F.3d 25, 33 (1st Cir. 2012) ("federal law" requires that dental services be provided "with reasonable promptness"); *Bryson v. Shumway,* 308 F.3d 79, 89 (1st Cir. 2002) (§ 1396a(a)(8) "mandates that state plans 'must' ensure that medical assistance 'shall' be provided with reasonable promptness"); *Coalition for Basic Human Needs v. King,* 654 F.2d 838, 841 (1st Cir. 1981) (reasonable promptness regulations require that "medical care and services included in the plan shall be furnished promptly"); *see Doe v. Chiles,* 136 F.3d 709, 717 (11th Cir. 1998) ("[S]ection 1396a(a) – as further fleshed out by [its] regulations – creates a federal right to reasonably prompt assistance, that is, assistance provided without unreasonable delay."); *Stanton v.*

Bond, 504 F.2d 1246, 1250 (7th Cir. 1974) ("The mandatory obligation upon each participating state to aggressively . . . detect health problems and to pursue those problems with the needed treatment is made unambiguously clear").[17]

The Medicaid Act contains specific provisions for children's preventative and restorative health care services, titled Early and Periodic Screening, Diagnosis, and Treatment (EPSDT). 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(B), 1396d(r). Congress enacted the EPSDT provisions in order to ensure that children receive regular, preventive medical care so that conditions are detected "early" and treated promptly, before they become serious, debilitating, and/or chronic. As the Court of Appeals for the Fifth Circuit noted in its leading EPSDT decision, *S.D. v. Hood*, "[a] principal goal of the program is to '[a]ssure that health problems found are diagnosed and treated early, before they become more complex and their treatment more costly.'" 391 F.3d 581, 585-86 (5th Cir. 2004) (*citing* State Medicaid Manual, § 5010B).

Numerous other courts have held that Congress' intent would be thwarted, and the statute violated, unless services were provided as soon as a medical need was detected. *Clark v. Richman*, 339 F. Supp. 2d 631, 640 (M.D. Pa. 2004) ("The

[17] District courts have done the same. *Health Care for All, Inc. v. Romney,* No. 00-10833-RWZ, 2005 WL 1660667, at *10 (D. Mass. July 14, 2005); *Boulet v. Cellucci,* 107 F. Supp. 2d 61, 79 (D. Mass. 2000) (waiting list for services violates reasonable promptness requirements); *Mendez v. Brown,* 311 F. Supp. 2d 134, 138 (D. Mass. 2004); *Alexander A. ex rel Barr v. Novello,* 210 F.R.D. 27, 35 (E.D.N.Y. 2002).

Commonwealth's [Medical Assistance] program must also provide for the actual provision of EPSDT services in a timely fashion"); *Memisovski v. Maram*, No. 92C1982, 2004 WL 1878332 at *50 (N.D. Ill., Aug. 23, 2004) ("These EPSDT requirements differ from merely providing 'access' to services; the Medicaid statute places affirmative obligations on states to assure that these services are actually provided to children on Medicaid in a timely and effective manner."); s*ee also Katie A. v. Los Angeles County*, 481 F.3d 1150, 1159 (9th Cir. 2007) (same).

B. Under the Medicaid Act, States Are Required to Set Standards, Including Timelines, for the Prompt Provision of Medically Necessary Services.

The Medicaid Act mandates that States set reasonable standards for the provision of medically necessary services. 42 U.S.C. § 1396a(a)(17). Regulations applicable to services for children require that the responsible state agency "must set standards for the timely provision of EPSDT services, which meet reasonable standards for medical and dental practice . . . and must employ processes to ensure timely initiation of treatment." 42 C.F.R. § 441.56(e). Courts have enforced these provisions. *See Clark*, 339 F. Supp. 2d at 647 (upholding claim for "failing to employ processes to assure the timely provision of EPSDT services").

C. *Consistent with Federal Law, the Commonwealth Established a 14-Day Standard for Providing the Initial Appointment for ICC and IHT Services.*

As required by federal law, the Commonwealth established standards for the prompt provision of ICC and other remedial services. As required by paragraph 38(c)(viii) of the Judgment, these standards are set forth in MassHealth's program specifications for each service. Add. 30. The Commonwealth initially established a 3-day timeline for an ICC intake appointment, which was incorporated in the program specifications for ICC. Add. 43, n.3. When the Commonwealth's own data demonstrated massive noncompliance with this promptness standard, defendants proposed a new 14-day Medicaid standard for ICC. Add. 43. The Court reluctantly agreed and entered an order requiring compliance with this revised promptness standard. Add. 43. That order memorialized the Commonwealth's own Medicaid promptness standard and made it enforceable by the Court.

1. The 14-Day Access Standard for ICC and IHT Defines Reasonable Promptness Under 42 U.S.C. § 1396a(a)(8).

The Commonwealth's own access standard, developed to comply with EPSDT's timeliness provision, also defines what the State must do to meet the reasonable promptness requirement. 42 U.S.C. §1396a(a)(8). Although the statute itself does not explicitly set a timeline for what constitutes promptness, it does do so by reference to the timelines in the reasonable standards provision, 42 U.S.C. §

1396a(a)(17), and the EPSDT timeliness regulation, 42 C.F.R. § 441.56(e), since all three requirements are intended to ensure that Medicaid services are provided when needed. As a result, courts have applied the statutory standards provision and the regulatory timeliness provision conjunctively with the reasonable promptness requirements of the Medicaid Act. *See Kirk T. v. Houstoun,* No. 99-3253, 2000 WL 830731 at *3-4 (E.D. Pa., June 27, 2000) ("[W]hether the regulation or merely the statute is used as a guide, services must still be provided with reasonable promptness.").

The Commonwealth's standard is plainly reasonable, especially given the more stringent standards employed by similarly-situated States. In establishing its 14-day access standard, the Commonwealth conducted a comprehensive survey of other States that offer home-based services under their EPSDT programs. App. 320-21. All of these other programs have reasonable promptness standards shorter than those adopted by the Commonwealth.[18] Most significantly, none of the cited research suggests that any of these programs fail to adhere to their own, mandatory access standards. App. 346-48 (Tracy Affidavit discussing research survey).

[18] Arizona, the program defendants deem the most relevant and comparable, contacts families in immediate need within *two hours,* those with urgent needs in *twenty-four hours* and provides routine appointments within 7 days – a far more rigorous standard than the Commonwealth has established. Significantly, all of the programs relied upon by the Commonwealth require meetings with families within 10 days. App. 348, n.1.

The Court made detailed findings concerning SED children's urgent need for home-based services, Add. 40-41, 48-49, 76, 81; the devastating effects of delays in treatment, Add. 43, 51, 53, 72, 81-82; and the recommendation of the NECCAP mandated by federal law, that 10 days was the "outside limit" for providing an initial appointment for ICC services, App. 629-31. Based upon these well-supported findings, the Court properly concluded that the Commonwealth's 14-day standard was a "generous interpretation of the 'reasonable promptness standard'" Add. 51, and one it could rely on when assessing whether defendants were providing ICC and IHT services in compliance with federal law.[19]

2. The Commonwealth Is Required to Comply with Its Own Timeliness Standard.

The defendants recognize that, under the EPSDT provisions of the Medicaid Act, they must establish access standards and timelines for the provision of EPSDT services. Add. 49; Defs.' Br. 24, 26, 35 (Judgment requires that the Commonwealth has program specifications for reach remedial service), 39 (federal law requires State to establish timeliness standard). Despite their recognition that EPSDT requires States to establish timeliness standards, defendants then claim that they do not have to comply with these standards and courts cannot enforce them.

[19] That the Court has the power to enforce its own remedial order is undisputed. Since the Judgment was, at the defendants' insistence, not a consent decree, some limitations on subsequent orders to enforce a consent decree are not relevant here. Defs' Br. at 37, 50.

Defs' Br. at 41, 43 (MassHealth complied with the Medicaid Act by setting a standard; it has no obligation to adhere to that standard).

There is nothing in the Medicaid Act, and specifically in its EPSDT provisions, to suggest that the reasonable promptness requirements are simply aspirational. Rather, these provisions require States to establish their own access standards, which must be reasonable and consistent with accepted medical practice, and then mandate compliance with these self-imposed criteria. Having established a 14-day Medicaid access standard, federal law requires that defendants comply with it.

As their own data demonstrates and the Court found, defendants have not implemented these standards, nor compelled compliance by their providers. That is a violation of both EPSDT's standards requirement as well as Medicaid's reasonable promptness provision.

D. The Court Properly Relied Upon the State's Own 14-Day Standard to Measure Compliance with the Medicaid Act.

Waiting lists for medically necessary Medicaid services that exceed the Commonwealth's own access standards are a *per se* violation of the Act. Waiting lists for children who urgently need home-based services to prevent a worsening of their condition also contravene the EPSDT provisions of the Act. App. 1229. Add. 71-72.

Defendants contend that while they must establish a timeliness standard for providing services that is consistent with – although at the outer limits of – reasonable medical practice, they are free to disregard that timeline, or, at the very least, that the Court cannot rely upon that standard in assessing whether legal requirements have been met. Defs' Br. at 35, 43. This is simply wrong as a matter of law and is inconsistent with the intent of the Act. The very purpose of the reasonable promptness provision, as confirmed by this Court and many others, is to ensure that Medicaid services are actually provided promptly when needed. *See* Sec. I.A. The same is evident from the language of the EPSDT regulation on access standards: "to ensure the timely initiation of treatment." *See* Sec. I.B. And, as noted above, the central purpose of the EPSDT provisions of the Act is to guarantee both "early" and timely medical treatment for children. Under federal law, defendants cannot establish a timeliness standard for providing ICC and IHT services promptly, then disregard it and still be in compliance with that very same law.

II. The Court Properly Interpreted or Modified Its Judgment to Include a Specific Standard for Providing ICC Services Promptly.

Almost immediately after implementing the ICC program in July 2009, defendants failed to comply with their 3-day program specification requirement for scheduling the first intake appointment. Statement of the Case (SOC), Sec. C. Defendants failed to provide ICC services as required by Medicaid's reasonable

promptness and EPSDT provisions, their respective implementing regulations, and the Judgment. In 2010, after waiting almost a year for some improvement, plaintiffs filed their first motion seeking to end waiting lists for ICC.[20] App. 43-46. The Court afforded the Commonwealth almost another year to collect data, to reduce waiting lists, and to take corrective actions to improve its performance. SOC, Sec. C. This patience was unavailing. At the invitation of the Court, plaintiffs filed a supplemental motion to end ICC waiting lists in 2011. App. 290-94. Based upon the Commonwealth's own data, the Court determined the defendants were "substantially out of compliance," App. 422-23, and invited them to propose a modification to their timeliness standard. They did, after the federally-required consultation with professionals and a survey of similarly-situated State programs. The result was the more lenient 14-day access standard. The Court then approved and ordered compliance with this agreed-to standard.

[20] Plaintiffs intentionally did not style their motion as one for contempt, both because they did not seek traditional contempt remedies, e.g., fines, and because the more adversarial tone of contempt was inappropriate given the parties' efforts to collaborate on implementation. Nothing requires a party seeking compliance with a court order to rely exclusively on contempt motions and sanctions. Courts have inherent authority to protect their judgments and enforce their own orders without making a finding of civil contempt. *S.E.C. v. AmeriFirst Funding, Inc.,*No.3:07-1188, 2010 WL 997388, *8 (N.D. Tex. Mar. 18, 2010) (enforcing order "without finding that . . . [the target had] acted contemptuously) (*citing Degen v. United States,* 517 U.S. 820, 827 (1996)). The decision in *Hawkins v. Dep't of Health & Human Servs for N.H.*, 665 F.3d 25 (1st Cir. 2012), is not to the contrary, since, as this Court noted, the consent decree which plaintiffs sought to enforce explicitly required a motion for contempt. *Id.* at 29-30.

App. 632-33, 637, 639, 43, 48-51. Defendants never appealed this Order; nor did they dispute that the 14-day standard was reasonable or achievable.

A. The Court Has the Authority to Interpret Its Judgment to Require Compliance with the Commonwealth's Own Timeliness Standard.

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. *Brewster v. Dukakis,* 675 F.2d 1, 3 (1st Cir. 1982) (endorsing court's authority to interpret and then enforce its judgment); *In re Pearson,* 990 F.2d 653 (1st Cir. 1993) (same).

Here, the Court properly interpreted its own Judgment and determined that the Commonwealth's timeliness standard – that defendants had prepared after their federally-required consultation and then incorporated in their ICC program specifications, which were themselves required by paragraph 38(c)(vii) of the Judgment – was binding. The Court's interpretation of its own Judgment to require compliance with the Commonwealth's timeliness standard was entirely proper.

B. Alternatively, Consistent with Paragraph 50(a) of the Judgment, the Court Modified the Judgment to Incorporate the 14-Day Time Period for Providing an Initial Appointment for ICC.

Under the terms of the Judgment, the Court had the authority to modify its remedial order, based upon the parties' agreement. In response to the Commonwealth's request to enlarge the initial 3-day ICC access standard, the

Court afforded defendants a further opportunity to reconsider and modify that standard, rather than immediately enforcing it. SOC, Sec. C. After allowing defendants this opportunity, the Court issued an order on March 20, 2012, modifying its Judgment and adopting the Commonwealth's "very generous" access standard. Add. 51; App. 632-33.

While defendants cite no case holding that under Rule 58(a), a separate document is necessary to reflect a modification or amendment to a judgment, Defs' Br. at 41,[21] the March 2012 Order constituted just such a document. The Court explicitly noted that it "approved a fourteen-day access standard" for ICC. It described with specificity the actions that defendants are required to take in a manner that, contrary to defendants' argument, *id*. at 53, clearly satisfies the standards of Rule 65(d). *Villodo v. Castro Ruz,* 821 F3d 196, 204 (1st Cir. 2016) ("Rule 58 does not require that a separate judgment use any particular words or form of words" provided that it is complete and describes the relief). Defendants never appealed the March 2012 Order. Instead, they acknowledged that this access standard was required by federal law, Defs' Br. at 39-40, repeatedly stated they intended to meet this standard, App. 628, 651, and provided monthly data measuring their compliance against this standard.

[21] Neither of the cases defendants cite – *Healey v. Spencer,* 765 F.3d 65 (1st Cir. 2014) or *NBA Properties, Inc. v. Gold,* 895 F.2d 30 (1st Cir. 1990) – even mention Rule 58, much less provide any support for finding a violation of Rule 58 here.

Moreover, to the extent Rule 58(a) is relevant at all, it is to establish a deadline for appeal, which defendants never exercised. "The sole purpose of the separate document requirement, enacted by a 1963 amendment to Rule 58, was 'to establish a certain reference point for determining the timeliness of post-judgment motions and appeals.'" *Fiore v. Washington Cty Commty Mental Health Ctr*, 960 F.2d 229, 236-37 (1st Cir. 1992) (party waives separate document requirement when it fails to exercise its right to appeal for an extended period of time); *White v. Fair,* 289 F.3d 1, 8 (1st Cir. 2002). Since defendants never once in seven years argued that they were not required to comply with their own access standard, they cannot now rely upon Rule 58(a) to excuse noncompliance with the ICC timeliness requirement.

C. The Court Had Good Cause to Modify the Judgment Under Paragraph 50(b) to Require that the Commonwealth Provide an Initial ICC Appointment Within 14 Days.

The Judgment also allows modification based upon good cause, which existed here given the Commonwealth's finding that providers could not consistently meet the 3-day standard. Add. 37. This good cause standard is more flexible than the formal requirements of Fed. R. Civ. P. 60(b)(5), since it does not require a showing of unforeseen circumstances nor proof that the modification is necessary to avoid an undue burden. The Commonwealth's own data, which documented average wait times of 21.5 days just for an initial appointment,

demonstrated a pervasive pattern of noncompliance with its initial timeliness standard. SOC, Sec. C. When defendants realized that they could not meet their own 3-day timeline, they asked the Court to enlarge it. App. 502. The Court accepted both the good cause rationale for the modification, and defendants' specific proposal, and incorporated the new 14-day timeline in its modification order of March 20, 2012.

D. The Court Had the Authority to Sua Sponte Modify the Judgment to Require that the Commonwealth Provide an Initial Appointment for ICC Within 14 Days, Pursuant to Rule 60(b)(5).

Rule 60(b)(5) permits a party to obtain relief from a judgment or order if "applying it prospectively is no longer equitable." *Rufo v. Inmates of the Suffolk Cnty Jail*, 502 U.S. 367, 383-84, 391 (1992); s*ee also King v. Greenblatt*, 149 F.3d 9, 21-22 (1st Cir. 1998) (concluding evidence of a significant change in approach to treatment of, and conditions of confinement for, sexually dangerous persons amounts to the significant change in fact required by *Rufo*).

In 2009, the Supreme Court affirmed the *Rufo* standard for equitable relief in *Horne v. Flores*, describing the relevant inquiry as "whether 'a significant change either in factual conditions or in law' renders continued enforcement of the judgment 'detrimental to the public interest.'" 557 U.S. 433, 453 (2009) (citing *Rufo,* 502 U.S. at 384). The Court emphasized that district courts must be flexible and allow modifications based upon a range of changed circumstances, where such

revisions will promote compliance with federal law and further the public interest. *Id.* at 450; *see also Boston Chapter, NAACP, Inc. v. Beecher*, 295 F. Supp. 3d 26, 30 (D. Mass. 2018) (concluding that "the 'flexible standard' in Rule 60(b) applies to consent decrees.").

Plaintiffs' initial and supplemental access motions sought to require the Commonwealth to provide ICC as it had promised and without lengthy waiting lists prohibited by the Medicaid Act. SOC, Sec. C. After the Court considered data demonstrating a persistent pattern of noncompliance with the Commonwealth's initial timeliness standard, and when defendants argued that unforeseen circumstances caused these delays, the Court determined that it would better serve the public interest if it afforded defendants the opportunity to modify their access standard and program specifications. It urged plaintiffs to accept the new 14-day timeline, which they reluctantly did. *Id.* Having given all parties notice of its intention to require compliance with the Commonwealth's timeliness standard, and then the opportunity at two hearings to discuss the Commonwealth's proposal to dramatically enlarge the standard, the Court had the authority to *sua sponte* modify its Judgment to incorporate that standard. *In re Pearson,* 990 F.2d at 658-59 (*sua sponte* order to ensure appropriate monitoring of institutional reform litigation is proper); *Dr. Jose R. Belaval v. Perez-Perdomo,* 465 F.3d 33, 37 (1st Cir. 2006) (*sua sponte* modification of order is proper, provided there is notice

and an opportunity to be heard). Thus, even under the more rigorous Rule 60(b)(5) standard for modification, the Court properly enlarged the timeliness requirement for providing an initial ICC appointment, and incorporated it in an order which explicitly described what defendants must do, when they must do it, and how they must account for what they have done. App. 62-33.

E. Since Defendants Never Appealed the 2012 Modification Order, But Instead Relied Upon and Sought to Comply with the 14-Day Timeline, They Cannot Now Claim That the Court Lacked the Authority to Require Compliance With This Standard.

The Court's March 20, 2012 Order has remained in effect, and unchallenged, for the past six years. Although defendants adopted, implemented, and later stipulated to the relevance of this standard for purposes of disengagement, they have never actually complied with it. SOC, Secs. D, E; App. 1516, 1537-38.

Despite the parties' and the Court's longstanding reliance on the Commonwealth's access standard for determining compliance with the Judgment, as well as with the requirements of the Medicaid Act, defendants now seek to renounce this history. They disavow their access requirement and claim that it is aspirational, unenforceable, and even irrelevant to whether monitoring and reporting under the Judgment should be continued. Defs' Br. 42-44. This extreme reversal should be rejected.

Defendants' new position depends on a distorted reading of the history of this litigation. Add. 49-51. In defendants' view, their violation of the Medicaid

Act's reasonable promptness provision, which was a foundation for the Court's liability determination, *Rosie D.,* 410 F. Supp. 2d at 53-54, and which was directly reflected in its Order approving the Judgment, *Rosie D.,* 497 F. Supp. 2d at 79, somehow ended when the first ICC program appeared in 2009. According to defendants, it matters not that from the outset, ICC services were never provided promptly, as documented by defendants' own data and as shown in plaintiffs' 2010 and 2011 motions for timely access. According to defendants, their failure to provide ICC services consistent with their own access standard does not demonstrate a continued violation of reasonable promptness, but rather a "fresh" violation of the Medicaid Act.[22] Defs' Br. at 44-46. Where, as here, current data leads a court to find a continued failure to rectify the federal law violation that supported its initial liability decision, it is incumbent on that court to maintain oversight of its orders. *See Horne v. Flores,* 557 U.S. 433, 450 (2009) (absent a showing of compliance with federal law and attainment of the objectives of a remedial order, termination would be inappropriate).

[22] Unlike the only case cited by defendants for their "fresh violation" theory, where the legal claim upon which plaintiffs relied had never been pled or adjudicated, Defs' Br. at 46 (discussing *Harvey v. Johanns,* 494 F.3d 237, 244-45 (1st Cir. 2007)), here the Court has found an ongoing violation of Medicaid's reasonable promptness provision and the EPSDT access regulation. And unlike the "bootstrapping" argument rejected in *Harvey,* these Medicaid violations formed the foundation of the Judgment, are set forth in the four corners of the Judgment, and were the exclusive focus of the remedial actions it required.

Furthermore, the Court's adoption of the Commonwealth's own Medicaid access standard hardly can be described as "an injunctive blank check." Defs' Br. at 46. To the contrary, in a display of respect for the Commonwealth, the Court both adopted defendants' remedial plan as its Judgment, and then later adopted defendants' revised timeliness standard. SOC, Sec. C. This is distinctly different from the facts in *Salazar v. District of Columbia,* 896 F.3d 489 (D.C. Cir. 2018), where the district court attempted to modify its injunctive order by incorporating new federal law requirements concerning Medicaid provisions that previously had been satisfied and dismissed. Defs' Br. at 46-47.

Here, the Court relied upon its initial finding of noncompliance with the reasonable promptness provision of the Medicaid Act; the numerous motions, hearings, findings, and data demonstrating increasingly long and persistent waiting lists for ICC services; and extensive, but unsuccessful, efforts to cure these ongoing federal law violations. Rather than impose a new mandate to remedy these violations, the Court accepted what defendants proposed, and then refused to terminate monitoring and reporting when they failed to do precisely what they promised.

III. The Court Properly Determined that Defendants Did Not Provide ICC Services with Reasonable Promptness.

A. The Defendants' Data Demonstrates a Longstanding Violation of Federal Law.

The Court's factual findings, which must be accepted as true unless clearly erroneous, demonstrate a persistent, longstanding failure to deliver service coordination through the ICC and IHT remedial programs with reasonable promptness. Add. 42-43, 45, 48-49, 75, 82-83. What defendants characterize as an unproven violation has actually never been in dispute. Defs' Br. at 44. Virtually all available data on waiting lists, the length of time youth and families wait for service coordination, and the extent to which individual providers comply with the Commonwealth's reasonable promptness standard, is collected and reported by defendants.

Evidence of delays in timely access to service coordination date back to 2010 – only months after remedial services first became available to the class. App. 39-42, 48-49.[23] The Court repeatedly recognized these delays as evidence of noncompliance with the Judgment and as a continuation of federal law violations that the Judgment was intended to cure. App. 274-77, 288-89, 290-309, 376, 420-23. In 2012, defendants acknowledged that they had never delivered ICC in

[23] For instance, data from July of 2010 showed that, on average, class members waited more than 21 days for their first ICC appointment, and the majority did not receive an appointment within the timeframe mandated by the Commonwealth's initial access standard. App. 93-94.

accordance within the proposed 14-day standard, despite having set a much shorter 3-day standard in the original program specifications required by the Judgment. App. 652. The Court sought to remedy these violations by issuing further orders to reduce wait times and to ensure reasonably prompt access to ICC, App. 434-35, 632-34, 637-39, in accordance with the Commonwealth's proposed reasonable promptness standard. Add. 43, 48-52.

Yet waiting lists continued and even worsened. In 2015, defendants admitted to a "pervasive and lasting problem with access to services" and particularly in the provision of ICC and IHT. App. 1049. This pattern continued into 2017, as evidenced by lengthy waiting lists for ICC and IHT and defendants admitted failure to achieve even the modest year-to-year improvements set out in the Joint Disengagement Measures. App. 1165, 1169, 1205, 3281-84, 3351, 3353. In late 2017 and early 2018, the Court again expressed concern about continuing noncompliance with the 14-day reasonable promptness standard, and frustration with the lack of "concrete steps" to ensure class members are provided medically necessary services required by the Judgment. App. 1232, 1235-37, 1299, 1325, 1348-49.

At no point did defendants argue that the Court erred in holding the Commonwealth accountable to its own Medicaid reasonable promptness standard, or in seeking to measure compliance with federal law based on that standard.

Defendants' attempt to frame years of noncompliance as a "fresh" violation, Defs' Br. at 42, is contradicted by the Judgment, the Court's subsequent Orders, and the extensive factual record.

B. The Court Properly Relied Upon the Defendants' 14-Day Standard for Providing an Initial Appointment for ICC Services as a Measure of Compliance with the Judgment.

The Court was not precluded from looking to the Commonwealth's Medicaid reasonable promptness standard as a measure of compliance with its Judgment. Defs' Br. at 43. Federal law and First Circuit precedent provide courts with significant latitude in the enforcement of their own Judgments, including the exercise of equitable powers to ensure "the objects of the decree" have been attained. *Frew v. Hawkins,* 540 U.S. 431, 440-42 (2004).

The defendants' after-the-fact argument that reliance on the 14-day standard violates basic principles of fairness requiring that "those enjoined receive explicit notice" of what conduct is required, Defs' Br. at 37-38, is unsupported by the record and contrary to the explicit terms of the Court's March 2012 Order. Defendants proposed 14 days as the outside limit for the initial ICC appointment, which is only the first step in reasonably prompt service delivery. App. 493, 502. They then implemented that standard, repeatedly assured the Court of their intention to meet it, and made multiple reports to the Court on their compliance with it. App. 497, 628-29, 651, 1117, 1150, 1163, 1165, 1170, 1189, 3261, 3262-

63, 3265-97, 3351, 3353, 3355. In 2016, defendants stipulated to Disengagement Measures that adopted the 14-day standard as a benchmark for ending court monitoring and reporting, and later used the standard when arguing they had achieved substantial compliance with the Judgment. App. 1205-08, 1516, 1537-38. Given this history, for defendants to argue now that they were not on notice of what they were required to do is unpersuasive and should be rejected.

C. The Defendants' Noncompliance with the Judgment Justified Denying the Motion to Terminate Monitoring and Reporting.

The Court's 2019 decision evaluated compliance with the Judgment based on defendants' own legal and operational standards, developed in accordance with specific terms of the Judgment. Defendants' arguments that enforcement of these provisions violate principles of federalism or exceeded the scope and purpose of the Judgment are unpersuasive. Defs' Br. at 50-52. As the Court made clear in its liability findings, 410 F. Supp. 2d at 23, 38, 53-54, its remedial order, 474 Supp. 2d at 239, and throughout its 2019 opinion, Add. 43, 51-52, 67, 72-74, 81-82, the provision of reasonably prompt service coordination is at the very heart of the Judgment, is one of its explicit purposes, and is critical to the health and safety of vulnerable class members.

Defendants' reasonable promptness standard gives meaning to key obligations under the Judgment and provides a legitimate basis for measuring whether adjudicated violations of Medicaid law have been cured. Add. 67. The

Judgment requires that defendants establish program specifications for each remedial service, including required timeframes for initial appointments, clinical assessments, and ongoing service delivery. Add. 30. Defendants presented these specifications to the Court and to CMS, as part of a request to approve a State Plan Amendment for each of the remedial services. They were later revised by defendants to reflect the Court's 2012 order adopting the 14-day access standard for service coordination.

By accepting defendants' proposed remedial plan, and affording them the opportunity to design and implement program specifications consistent with the Judgment, the Court showed appropriate deference to the Commonwealth. When defendants later sought to modify the ICC program specifications over plaintiffs' objections, and to establish a new reasonable promptness standard, the Court again deferred to defendants and their medical consultants, rather than impose its own standard. App. 632-33, 637-38. But this deference cannot disempower the Court from ensuring compliance with the purpose and provisions of its Judgment and the requirements of federal law. *Horne,* 557 U.S. at 450 (terminating judicial oversight is proper only if the federal law violations, and conditions which flow from such violations, have been cured).[24]

[24] Defendants' entire federalism argument, Defs' Br. at 51, ignores the central holding of *Horne* – that federal courts should maintain oversight of remedial orders

The Court repeatedly looked to defendants to generate specific plans and action steps to come into compliance with revised program specifications and the 14-day reasonable promptness standard. Yet defendants now claim this judicial restraint runs afoul of principles of federalism, and that any effort to hold them accountable to the specifications and standards they created pursuant to the Judgment would exceed its scope and objectives. The opposite is true. By allowing defendants to craft the remedy, develop their own timeliness standards, and modify that standard when their own data indicated compliance was challenging, the Court demonstrated its respect for these principles. Defs' Br. at 51 (citing *Frew,* 540 U.S. at 442 (court should relinquish oversight of state service system only when "objects" of decree are attained)).

The cases relied upon by defendants are readily distinguished. First, defendants cite several decisions involving court-ordered consent decrees, where the courts' authority to interpret and enforce compliance is governed by rules of contract and constrained by the express terms of the parties' agreement. Defs' Br. at 37-38. Other cases cited by defendants involve standards for contempt, where parties seek protection against citation for acts or omissions embodied in outside agreements or otherwise too vague to be understood, neither of which is relevant here. *Id.* Finally, defendants cite to the general principle that a court's

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when the underlying federal law violation remains, which are precisely the factual findings that the Court made here.

enforcement jurisdiction "extends only as far as required to effectuate a judgment." *Harvey*, 494 F.3d at 244 (quoting *Fafel v. DiPaola*, 399 F.3d 403, 411(1st Cir. 2005)). But the relief sought by defendants – termination of court monitoring and reporting – corresponds to a specific provision of the Judgment, and the Court's rationale for denying that relief was properly tied to noncompliance with the Judgment, subsequent court orders, and a failure to cure the underlying federal law violation. Add. 36-37, 39, 42-44, 70, 81-83.

The Court sought to enforce specific terms and general requirements within its Judgment. Not only did defendants understand the meaning of these obligations, they helped create them. From the remedial plan to the program specifications, to the establishment of reasonable promptness standards required by Medicaid law, defendants' actions gave specific meaning to these requirements of the Judgment. And they routinely reported to the Court on the outcome of their efforts, as part of the ongoing oversight of the Judgment. Add. 56. Throughout the remedial phase of this case, the Court has shown a desire to end court monitoring and reporting as soon as there was evidence that the remedy was effectively implemented and operating consistent with federal law.[25] Add. 41-42, 45, 50, 56-

[25] Specifically, the Court urged the parties to develop a joint pathway to disengagement by establishing disengagement criteria. SOC, Sec. E. However, defendants failed, yet again, to meet the stipulated targets for providing ICC and IHT services promptly that were incorporated in the Joint Disengagement Measures. Add. 66-67; App. 1165, 1169, 1299, 1348-49.

58, 60-62, 64-65. But despite the Court's patience, and its repeated urging for a plan or some action to address longstanding waiting lists,[26] defendants have consistently failed to demonstrate such compliance with the Judgment and federal law.

Even apart from the Disengagement Measures, the record demonstrates defendants' failure to comply with Section I.C of the Judgment, including ensuring the delivery of service coordination to class members with reasonable promptness, Add. 65, 82, and their failure to cure ongoing violations of federal law. Accordingly, the Court's decision not to relinquish active court monitoring and reporting was appropriate. Add. 73, 83.

D. Defendants' Noncompliance with the Medicaid Act Justified Denying the Motion to Terminate Monitoring and Reporting.

Defendants' failure to provide medically necessary service coordination with reasonable promptness was central to the federal law violation found in 2006. The Court concluded that clinically proven and cost effective service coordination was available in Massachusetts, yet defendants failed to provide it to class members with reasonable promptness. Add. 42, 52-54. Defendants' appeal attempts to recast that original violation, asserting that the mere creation of ICC and IHT

[26] *See e.g.* Add. 21-22, 30 (looking for "concrete steps that the defendants are taking that have a realistic possibility of making a substantial difference in terms of access"), 31 ("no confidence we have a plan to deal with the access issue"), 41-42 ("Something effective must be done, some credible plan adopted").

discharged their legal obligations, regardless of whether these services are provided promptly to those who need it. This argument was rightly dismissed by the Court as inconsistent with Medicaid law and its own Judgment:

> Any suggestion that the remedial order requires Defendants to develop services, but not to deliver them with "reasonable promptness" … flies in the face of the explicit liability finding, the manifest importance of the remedial order, and most importantly, the clear language of the Medicaid statute itself and the law's regulations.

Add. 51.[27] *See Frew*, 540 U.S. at 440-42.

Though understandably narrower in scope, the Court's 2019 Order is focused on the same federal law violation the Judgment intended to cure – the failure to provide care coordination through ICC and IHT promptly.[28] It noted that, in 2006, "the absence of adequate, timely intensive care coordination was a crippling deficiency in the Commonwealth's system of care for SED children." Add. 48. And while it may be true that the Court cannot seize on violations from a "whole new statute" as the basis for continued monitoring and reporting, Defs' Br. at 47, that is plainly not what the Court did here. Rather, it recited a persistent

[27] The Court rejected a similar argument in its underlying liability decision, concluding that "[b]ecause Defendants have failed to meet the substance of the EPSDT mandate, they have not satisfied Congress'' command to provide services with '"reasonable promptness.'" 42 U.S.C. § 1396a(a)(8)." *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 53 (D. Mass. 2006) (citing *Boulet v. Cellucci*, 107 F. Supp. 2d 61, 79 (D. Mass. 2000)).

[28] Defendants' entire argument in this appeal – that by creating new remedial services, even if these mandated services are not provided promptly as defined by defendants' own access standard – somehow satisfied the purpose and provisions of the Judgment even though it may violate federal law – strains credulity.

pattern of long delays and waiting lists for ICC that undeniably constituted a failure to provide these services promptly. Add. 43. Based upon defendants' own data, the Court found that this failure began shortly after the program was initiated in 2009 and persisted over the next decade. Add. 57-69.

A finding of substantial compliance can never be appropriate when the continuing federal law violations identified by the Court are the very same violations that gave rise to the underlying liability decision, and the Court's subsequent Judgment. Federal courts have the authority and responsibility to enter and enforce decrees where necessary to cure continuing legal violations. *See, e.g., Mackin v. City of Boston*, 969 F.2d 1273, 1277-78 (1st Cir. 1992) (finding that "the fashioning of a structural decree, like the decision as to whether to modify or dissolve it, is at bottom an exercise of equitable power") (citing *Freeman v. Pitts*, 503 U.S. 467 (1992)).

The Supreme Court has recognized that, before a court terminates its supervision of a systemic remedial order, it must be assured that the federal law violations have ended, the conditions which gave rise to those violations will not resurface when the court terminates active supervision, and there is proof that a "durable remedy" exists to ensure that systemic improvements are sustained. *Horne*, 557 U.S. at 450; *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498

U.S. 237, 249-50 (1992). A history of good faith compliance is a key factor in concluding that remedial reforms will be sustained. *Freeman,* 503 U.S. at 498.

Given defendants' longstanding failure to comply with their own reasonable promptness standard, the Court's finding that there were no concrete plans to remedy waiting lists and related delays in access to ICC and IHT, and the Commonwealth's failure to develop a sustainability plan, there was no basis on which the Court could conclude that a durable remedy was in place.

Although framed as a federalism argument, Defs' Br. at 50-52, what defendants actually seek is the 'flexibility' to continue to violate federal law, based on their own, unilateral conclusion that they have satisfied the terms of the Judgment. Such an outcome would be a perverse distortion of *Horne's* holding that defendants may not be relieved of judicial oversight and continuing jurisdiction, unless and until underlying federal law violations, and the conditions which flow from those violations, have been cured. 557 U.S. at 450, 454.

IV. The Court Properly Modified Its Judgment to Extend Its Monitoring and Reporting Requirement Beyond the Proposed Five-Year Timeline.

A. From 2012 to 2018, the Court Properly Extended Monitoring and Reporting Under Paragraph 50(b) of the Judgment by Agreement of the Parties.

Circumstances surrounding the first extension of court monitoring and reporting in 2012 are described in the Court's 2019 decision and summarized above. *See* SOC, Sec. D. The Court anticipated defendants would not achieve substantial compliance by July 2012 and, as a result, defendants agreed to extend monitoring and reporting obligations to at least December 2012. App. 635, 641, 650. This agreement was memorialized in the Court's March 2012 Order, well before defendants submitted their May 2012 Report on Implementation. App. 633. That Report acknowledged that certain obligations remained outstanding, and did not include a motion to terminate monitoring and reporting, something defendants later described as a "conscious choice." Add. 60; App. 829-30.

In the six years that followed, the Court Monitor's appointment was extended 10 times by agreement of the parties.[29] Add. 61-62. The record leaves no doubt that these agreed-to extensions were knowing and voluntary actions on

[29] After hearing argument on and taking under advisement defendants' Motion to Terminate, the Court recognized that its prior extension of the Court Monitor's appointment ended on December 31, 2018. Rather than allowing the appointment to expire, for the eleventh time the Court once again extended her term for another six months, or until June 30, 2019 -- once again without objection from defendants. Dkt. 869. As had been the case for the ten prior extensions, defendants never appealed the order.

defendants' part. App. 968-74, 985, 992-93, 1056-57, 1107-09. As a result, it was proper for the Court to view the parties' agreements as a voluntary modification of the Judgment, pursuant to paragraph 50(b).

Additionally, there is no evidence that defendants' willingness to continue monitoring and reporting was ever interpreted by the Court to be an "indefinite extension" of the Judgment's terms. Defs' Br. at 52. The 10 extensions – each for time-limited periods – clearly demonstrate otherwise. Defendants were free anytime between 2012 and 2017 to file a motion to modify or terminate their obligations under the Judgment or, at the very least, the provisions on monitoring and reporting, but chose not to do so. Rather, every six months they affirmatively sought or consented to an extension, which was then memorialized by minute entry or further order of the Court. App. 632-34, 1000, 1018. As a result, defendants have waived any argument that the Court erred by not enforcing the Judgment's original five-year time frame for monitoring and reporting.

B. The Court's Repeated Extensions of Monitoring and Reporting Is Consistent with Paragraph 50(a) of the Judgment.

The Court's Judgment allows for modification of its terms "for good cause upon application to the Court by either party." Add. 37. In 2018, when defendants sought to terminate court monitoring and reporting, plaintiffs opposed this motion, and the Court found numerous failures by the Commonwealth to comply with the Judgment and ongoing violations of federal law. Add. 42-44.

Plaintiffs argued that defendants had failed to comply with provisions of the Judgment on assessments, service coordination and service planning, reasonably prompt access to remedial services, provider capacity, and network adequacy. Add. 42-44; App. 3262-63, 3265-97. These continuing deficiencies resulted in a failure to cure long-standing Medicaid violations. *Id.* The Court agreed, concluding that there was "glaring" evidence of noncompliance with Section I.C of the Judgment and continuing federal law violations. Add. 70, 81-82. A "credible plan" was required to remedy this situation before court monitoring and oversight could be terminated. Add. 80-81.

Relinquishment of active oversight and targeted monitoring and reporting should not occur until defendants have demonstrated substantial compliance with the Judgment, cured the legal violations that resulted in the Judgment, and thus satisfied the basic purpose of the Judgment. *In re Pearson,* 990 F.2d at 658-59. The Court's finding of noncompliance with federal law and its Judgment are sufficient "good cause" to extend monitoring and reporting obligations. Add. 38.

C. The Court Also Had the Authority to Modify the Judgment, Sua Sponte, Pursuant to Fed. R. Civ. P. 60(b)(5) Based on Changed Circumstances.

In its July 2007 order, the Court explicitly reserved authority and discretion to extend its oversight until the Judgment was fully implemented. Add. 8. In

response to the 2010 and 2011 motions for noncompliance, defendants admitted their failure to provide ICC consistent with their program specifications, and acknowledged that "concerted effort" would be required to come into compliance with the newly ordered 14-day reasonable promptness standard. App. 652. In January 2012, the Court reiterated its intention to maintain active oversight of the case until it was satisfied the remedial order had been implemented. App. 485-86. In response, defendants expressed their willingness to voluntarily extend the five-year monitoring period. Additionally, their May 2012 Report on Implementation stated that certain unspecified implementation tasks remained open and incomplete. App. 789.

Together, these facts were sufficient to constitute a changed circumstance required by Rule 60(b)(5), providing the Court with a clear basis for *sua sponte* modification of its Judgment, had the internal modification provisions under Paragraph 50 not applied. Defendants failed to complete required implementation tasks or remedy underlying legal violations within the time frame anticipated under the Judgment. Based on these changed circumstances, the Court had a reasonable basis to conclude that the Rule 60(b)(5) standard had been met, and that *sua sponte* modification was appropriate.

D. The Court's Recent Extension of the Appointment of the Court Monitor Pending Appeal Was Reasonable and Necessary to Protect the Integrity of its Judgment and to Preserve the Status Quo.

Absent a stay of its order or judgment, a district court is authorized – in fact, obligated – to monitor and ensure compliance with its injunction. To do otherwise would render a stay unnecessary and undermine its duty to enforce its orders. Similarly, while an appeal is pending, a district court retains jurisdiction to enter a further order extending an injunction or taking judicial action necessary to preserve the integrity of its orders. A district court at least has an obligation to maintain the injunction while the appeal is pending, so that the appeals court has an opportunity to consider it. *See Iantosca v. Benistar Admin Servs., Inc.*, No. 08-11785-NMG, 2009 WL 2382750, at *9 (D. Mass. July 30, 2009) (denying motion to vacate six month preliminary injunction where the injunction is "currently on appeal to the First Circuit and this Court is disinclined to disrupt its consideration of the matter").

Here, confronted with the impending expiration of the eleventh assented-to extension of the Court Monitor's appointment order, the Court was appropriately hesitant to allow the duties of the Monitor and all reporting responsibilities to abruptly end, while defendants' appeal of their underlying Motion to Terminate

(No. 19-1262) was pending. This time defendants did not assent to the extension.[30] For the first time, the Court had to extend the Monitor's appointment over defendants' objection, which it did with good cause pursuant to ¶ 50(a). Its decision to do so was reasonable, given the Court's continuing jurisdiction over the Judgment, and defendants' ongoing legal obligations to implement and deliver medically necessary services pursuant to its terms. Finally, the Court recognized the need for a 'status quo' order retaining an experienced and long-standing Court Monitor, since it would be difficult, if not impossible, to assess ongoing implementation of the Judgment without her assistance, both now and upon remand.

CONCLUSION

Because this Court does not have jurisdiction over this interlocutory appeal of the District Court's refusal to terminate only the monitoring and reporting provisions of its Judgment, the Court should dismiss the appeal. In the alternative, the Court should affirm the District Court's decision allowing monitoring and reporting to continue, given the factual findings that defendants still are not providing ICC and IHT with reasonable promptness, as required by the terms and

[30] That defendants opposed the last extension motion demonstrates that they know they have to do so when they actually object to an extension. Similarly, that they appealed the Court's recent order extending monitoring (No. 19-1762) proves that prior assented-to orders, as well as the lack of appeal of any prior extension orders, were done with their agreement, as provided by § 50(b) of the Judgment.

purposes of the Judgment and federal law, and consistent with the Commonwealth's own timeliness standard.

RESPECTFULLY SUBMITTED,
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Dated: December 13, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 14,837 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit 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

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