

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Western Division**

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ROSIE D., et al.,)	
)	
Plaintiffs,)	
)	
v.)	
)	C.A. No.
)	01-30199-MAP
DEVAL L. PATRICK, et al.,)	
)	
Defendants)	
)	
)	

**DEFENDANT EOHHS’S MEMORANDUM OF LAW IN SUPPORT OF ITS
OTION TO MODIFY JUDGMENT**

The Massachusetts Executive Office of Health and Human Services (the “EOHHS”) hereby submits this memorandum of law in support of its Motion to Modify Judgment (the “Motion”), submitted herewith.

Introduction

Pursuant to the Judgment entered in this case on July 16, 2007, EOHHS has been ordered to implement fully a broad array of remedial services on or before June 30, 2009, so as to bring the Commonwealth’s provision of services to children with serious emotional disturbance (“SED”) into compliance with the federal Medicaid Act, 42 U.S.C. § 1396a(a), et seq. In its Motion, EOHHS has asked the Court, pursuant to Fed. R. Civ. P. 60(b) and paragraph 50(a) of the Judgment, to modify the Judgment so as to postpone the date by which certain services must be implemented from June 30, 2009, until July 1,

2010. Specifically, EOHHS has asked the Court to stagger implementation dates for In-Home Behavioral Services (i.e., Behavioral Management Therapy and Behavior Management Monitoring), In-Home Therapy Services, Therapeutic Mentoring Services, and Crisis Stabilization by one year, while leaving the June 30, 2009 implementation deadline in place with respect to all aspects of Intensive Care Coordination (“ICC”), Caregiver Peer-to-Peer Support, and Mobile Crisis Intervention.¹

ARGUMENT

I. A DISTRICT COURT MAY MODIFY ITS JUDGMENT WHERE A CHANGE IN CIRCUMSTANCES WARRANTS SUCH A MODIFICATION.

Fed. R. Civ. P. 60(b) authorizes a trial court, as a matter of discretion, to modify a pre-existing judgment or order upon, among other reasons, a showing that the prospective application of the judgment, without the requested modification, is no longer equitable. Fed. R. Civ. P. 60(b)(5). This standard was given texture by the Supreme Court in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992). In that case, in which the Suffolk County Sheriff had moved, pursuant to Fed. R. Civ. P. 60(b)(5), to modify a consent decree that required placement of inmates in individual cells, on the ground that approved plans for a new county jail provided insufficient cell space to meet the single-bunking requirement. Id. at 384. The Court held that a district court, at its discretion, may modify an earlier order or judgment where it concludes that the moving party has met its burden of establishing “that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider

¹ The Judgment conditions the implementation of all services upon their approval by the Center for Medicare and Medicaid Services (“CMS”), via relevant amendments to the Commonwealth’s state Medicaid plan. To date, CMS has approved the Commonwealth’s implementation of ICC; both Caregiver Peer-to-Peer Support and Mobile Crisis Intervention services remain under CMS review.

whether the proposed modification is suitably tailored to the changed circumstances.” Rufo, 502 U.S. at 383. The Court also noted that a party seeking modification need not show that compliance with the judgment in its present form is impossible, but must demonstrate that the changed circumstances render such compliance “substantially more onerous.” Id. at 384.

Alternatively, but in a similar vein, Fed. R. Civ. P. 60(b)(6), often referred to as the “catch-all provision” of Rule 60(b), authorizes the modification of a judgment “for any other reason justifying relief,” a standard which courts have generally interpreted to mean as arising from extraordinary circumstances that come into being through no fault of the moving party. See 12 Moore’s Federal Practice § 60.48[3] (3rd ed. 2008).

In the instant matter, EOHHS seeks to modify the existing Judgment by deferring the date by which certain enumerated services must be fully implemented, while leaving the implementation date for other core services (including ICC and related services) intact. The basis for the request is the fiscal crisis presently enveloping the Commonwealth as a whole, and EOHHS and MassHealth in particular. As set forth in the accompanying affidavits, the revenue shortfall in Massachusetts (both to date and as projected in the near term) have required precipitous cuts to virtually all areas of the state’s Medicaid budget. While MassHealth to date has held harmless all remedial services at issue in this case, EOHHS officials believe that continuing to do so may have an inequitable impact upon constituents of other MassHealth services.

Accordingly, because the magnitude of the ongoing fiscal crisis was neither foreseeable nor occasioned in any respect by the defendants, EOHHS submits that it is a

sufficient change in circumstance to warrant the Court's revisiting of the timing (but not the scope) of service implementation in this case.

II. THE MAGNITUDE OF THE PRESENT FISCAL CRISIS WARRANTS THE REQUESTED MODIFICATION IN THIS CASE.

As EOHHS and MassHealth officials attest in the accompanying affidavits, the fiscal crisis currently besetting the Commonwealth of Massachusetts generally, and EOHHS specifically, rises to the level of a profound change in circumstance since the Judgment was entered a year and a half ago. This fiscal sea change merits the modification to the Judgment that EOHHS seeks.

The accompanying affidavits of Stephen Barnard ("Barnard"), the chief financial officer for EOHHS (the "Barnard Affidavit"), and Thomas Dehner ("Dehner"), the Medicaid Director for MassHealth (the "Dehner Affidavit"), recount the chronology of events leading to the present budgetary crisis. Briefly stated, in October of 2008, the Secretary of Administration and Finance – the budgetary arm of the executive branch – notified the Governor of a revenue deficiency for Fiscal Year 2009 ("FY09") in the amount of approximately \$1.4 billion, and further revised FY09 tax revenues downward by approximately \$1.1 billion. Barnard Affidavit at ¶ 4. The Governor promptly took a number of steps in response to that information, including the implementation of mandatory spending cuts in the amount of \$624 million, pursuant to M.G.L. c. 29, § 9C (a statutory provision that authorizes the Governor to cut executive budgets without legislative approval). *Id.* More than half of that amount was taken from the EOHHS FY09 budget, including a \$293 million reduction of the MassHealth budget. Barnard Affidavit at ¶ 5. While MassHealth pursued a wide variety of strategies to remove that \$293 million from its already-approved FY09 budget, it took no steps to modify the

Judgment in this case at that time. A list of some of the cost-savings measures implemented by MassHealth in response to the October spending cuts is set forth in the Dehner Affidavit at ¶ 7.

It has recently become clear, however, that the Commonwealth's fiscal crisis is continuing to deepen. Barnard Affidavit at ¶ 6. At this time, EOHHS anticipates that the Governor will implement at least one more round of executive branch budget cuts pursuant to M.G.L. c. 29, § 9C (expected to be in the approximate amount of \$143 million statewide, with \$30.2 million of that total coming from the EOHHS budget). Id. Moreover, it is clear that the fiscal picture for FY10 will continue to darken. The Massachusetts Taxpayer's Foundation has already predicted that FY10 tax revenues will be almost \$2 billion less than projections compiled by the Executive Office of Administration and Finance in October, 2008. Barnard Affidavit at ¶ 7. This will have particularly dire consequences for MassHealth, given the counter-cyclical nature of Medicaid enrollment: i.e., even as available revenues drop, a foundering economy generally causes Medicaid enrollment to increase. Dehner Affidavit at ¶ 8.

Against this grim backdrop, the Governor and the Secretary of EOHHS have asked MassHealth officials to identify expenditure reductions that can be realized from virtually all areas of the MassHealth budget. Dehner Affidavit at ¶ 8. To that end, MassHealth has calculated that it would realize approximately \$38 million in savings from its FY10 budget if it were permitted to defer implementation of the services identified in the accompanying motion from June 30, 2009, until July 1, 2010. See Dehner Affidavit at ¶ 10.

To be clear, EOHHS does not contend that it will be administratively unable to comply with the terms of the Judgment absent the relief requested in this Motion. Indeed, EOHHS believes that it is currently on pace to implement all required services by the June 30, 2009 deadline, and will continue to take all steps necessary to achieve those implementation deadlines should the requested relief not be granted. Dehner Affidavit at ¶ 11. It is the considered judgment of EOHHS officials, however, that absent some proportional reduction from the budget allocated to achieve timely implementation of all services in this case, significant additional cuts will be required from other MassHealth programs and services.

This is not an optimal solution, and EOHHS pursues it reluctantly. However, as the Affidavit of Suzanne Fields, EOHHS's Director of Behavioral Health (the "Fields Affidavit"), sets forth in more detail, some ancillary benefits can be anticipated from a two-step phase-in of the remedial services in this case. Insofar as the ICC services act as the lynchpin of the structure being created for children with SEDs, EOHHS has reason to believe that it can integrate In-Home Therapy and other related services more seamlessly if it were to add them to already-implemented ICC services. Fields Affidavit at ¶ 5. Feedback from providers and managed care organizations likewise suggests that benefits will accrue from implementing these services sequentially, rather than simultaneously. Id. While these considerations alone likely would not have been strong enough for EOHHS to seek modification of the implementation schedule absent the intervening fiscal crisis, they should nonetheless be factored in when weighing the benefits and burdens of elongating the implementation schedule.

CONCLUSION

For the reasons set forth above, this Court, as expeditiously as practicable, should modify the Judgment as requested in EOHHS's Motion, by deferring the implementation deadline for In-Home Therapy and the other enumerated services from June 30, 2009, to July 1, 2010.

Respectfully submitted,

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Date: January 16, 2009

I hereby certify that a true copy of this document was served electronically upon counsel of record through the Court's electronic filing system on today's date.

/s/ Daniel J. Hammond

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