UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' PROPOSED ORDER ON OUTPATIENT AS A HUB

The Defendants oppose the entry of Plaintiffs' proposed order on outpatient services for three reasons. First, the order is unnecessary, as the parties have already agreed on the steps to be taken and are well underway in the implementation of that agreement. Second, the entry of the order would unnecessarily constrain the Defendants' ability to shape their outpatient policies to respond to new developments that arise upon implementation of the agreed-upon steps. Finally, entry of the order would inappropriately expand the scope of the judgment and remedial order without additional factual findings by the Court. Therefore, the Defendants do not agree to the entry of the proposed order on outpatient services.[1]

[1] As noted, for the purposes of this Opposition, the Defendants confine their arguments to why they do not believe *any* order should enter codifying the substantive agreement between the parties regarding outpatient services serving as a therapeutic hub. Consistent with the collaborative process envisioned by the Court, the parties have engaged in discussions, seeking to arrive at a document that properly described the substance of the parties' agreement (though deferring their dispute as to the *form* such agreement should take). This process has narrowed – but not eliminated – the parties' disagreements as to how the agreement should be described. The Defendants do not raise all their lingering objections to the specific language used in *this particular proposed order* here, but do reserve their rights, and ask that, if the Court decides to

I. An Order on Outpatient Services is Unnecessary.

At the Court's direction, the parties engaged in a collaborative and productive process of coming to agreeable terms on improvements to outpatient as a hub, terms that were laid out in the parties' submissions to the Court prior to – and discussed at – the last status conference in June 2016. The discussions between the parties generated an agreed upon set of actions that the Defendants would undertake to improve Collateral Contact, Case Consultation and Family Consultation services provided to children receiving outpatient care. Without conceding that Defendants are not in full compliance with the remedy, which the Defendants continue to maintain that they are, the Defendants have agreed to implement the following changes:

- That the MassHealth managed care entities (MCEs) would pay network providers for Collateral Contact, Case Consultation and Family Consultation services at levels comparable to the MCEs' rate for face-to-face therapy;
- That the MCEs' daily caps on these services would be removed;
- That the definition of Collateral Contact would be amended to allow for email and voicemail communication; and
- That the service descriptions and authorization parameters for these services would be made uniform across MCEs.[2]

Additionally, the parties have discussed – and MassHealth has agreed to implement – other steps to educate providers and to reshape practice, such as a web-based training for outpatient

enter an order, it provide the Defendants with an opportunity to raise those objections in order to preserve their arguments for any possible appeal.

[2] The Defendants had initially agreed to make medical necessity criteria for these services uniform as well. Upon further investigation, the Defendants have learned that some MCEs did not have medical necessity criteria specifically for these services, while others did. Rather than revising the criteria, the plans will be removing medical-necessity criteria with respect to these specific services.

clinicians and various monitoring and feedback activities based on information from claims and from systematic chart reviews.

As of the date of this filing, MassHealth is well underway in implementing the steps agreed to by the parties. By October 1, 2016, MassHealth intends to have contract amendments in place with its managed care entities to implement the rate floor for the three services mentioned above, and to revise the service definition of Collateral Contact that appears in the contracts. And, as of this writing, all MCEs have eliminated their daily caps on the three services at issue. MassHealth is actively working with its MCEs to create uniform service descriptions and authorization parameters and expects those changes to be completed shortly. MassHealth also intends to have contract amendments in place by October 1, 2016, to implement the chart reviews. Starting in the fall, the Defendants intend to develop a chart review protocol to be implemented by the MCEs pursuant to these contract amendments.

All of these steps have been taken based on the agreement of the parties – without an order from the Court. Defendants respectfully submit that no such order is necessary, particularly at this stage when much of the implementation work is or will soon be done. Defendants request that the Court decline Plaintiffs' invitation to enter an unnecessary order.

II. The Order May Limit Defendants' Ability to Adapt to Changes in the Outpatient System as Improvements are Realized (or Not).

Potential unintended consequences also weigh against entering the proposed outpatient order. Binding the Defendants to the terms of the order may prove to constrain the Defendants' ability to adapt their policies and practices to changes in the outpatient system once empirical data allow the Defendants to assess which elements of the agreed-upon approach have led to their intended results, and which, potentially, have not. As administrators of the outpatient

service, the Defendants require a certain degree of flexibility that the proposed order would inhibit, if not outright preclude.

For example, as outpatient providers become more incentivized, better trained, and better equipped to deliver collateral contacts, case consultations, and family consultations, the Defendants may see (indeed, hope to see) a marked uptick in both the frequency and the quality of the delivery of these services. When these results are realized, the Defendants may find it prudent to narrow the scope of the initiative to class members only.[3] (Just because the Defendants have agreed to implement these changes for all MassHealth members under 21, such an expectation should not be codified into a Court order.) Or perhaps the Defendants will one day learn from their case reviews that voicemail communications are not effective and are simply running up claims without clinical impact. If that should happen, Defendants may find it prudent to reinstitute a carefully tailored restriction on such communications and should not be constrained from doing so by this proposed order.

Similarly, the proposed order appears to limit reasonable use of quantitative benchmarks to manage utilization as, for example: "[T]here will be no limitations or caps on the content, scope, or time devoted to any of service coordination activities in Outpatient Therapy, consistent with the service definitions of the Provider Manual, provided it is reasonably related to the needs of the child." Attachment A to Proposed Order, at Section B (Doc. 751-1). If Defendants were reasonably to decide, for example, that providers billing at the 95% percentile for collateral contacts should have to undergo additional utilization review, they would be at risk for having imposed a "limitation" or "cap," since the benchmark (and associated impact on providers) is not

[3] Alternatively, if the Defendants find that the current plan is not producing the desired impact, Defendants may seek to limit the initiative to class members or to some other demographic to better realize improvements for targeted groups of MassHealth members.

based on evaluation of the needs of each individual child. Managing a system using benchmarks is standard practice in healthcare, however, and need not conflict with individualized care. The proposed order could, however, impede such reasonable management practices.

Furthermore, at the last status conference, the Court expressed an interest in seeing a way forward to the end of disengagement. The Defendants respectfully submit that by entering the proposed order, the Court will be taking a step backward in this regard. To this end, the Defendants have put forth a plan for disengagement that shifts focus from implementation activities to quality measures. Defendants' disengagement plan gives the Defendants the autonomy to manage their system and services to address and improve quality when ICC and IHT have hub responsibilities. Similarly when Outpatient serves as a hub, the Defendants must have the flexibility to provide the active management required to adapt to changing circumstances in the delivery of Outpatient services, particularly because Outpatient services are not part of the remedial order. The Defendants should not be constrained as to the minutiae of program management, as the proposed order seems to suggest. Entering an order that micromanages the Defendants undermines the movement toward self-sustaining disengagement.

If the Court enters this order, the Defendants will be denied the latitude to adapt their program to meet the changing needs of their members or the changing landscape of service delivery. Such constraints on the Defendants' authority are unnecessary and improper. This is true, particularly in light of the shared goals and cooperation the parties have exchanged in regards to this initiative. The Defendants respectfully submit that a Court order would unduly circumscribe the Defendants' ability to adapt their strategy to achieve the agreed-upon goals of the parties.

III. The Court should not Expand the Scope of the Remedial Order.

Finally, the Court should decline to enter the proposed order on outpatient services because it would expand the scope of the remedial order. Outpatient services are not – and have never been – one of the remedy services ordered by this Court almost a decade ago. Thus, entering the proposed order would expand the remedial order's definition of "remedy services," and would require, among other things, a substantive modification of the remedial order. Because the parties do not agree to the modification of the remedial order, the Court may only alter the terms of such a judgment pursuant to a motion under Fed. R. Civ. P. 60(b)(5), and only where the moving party meets its burden of demonstrating that a significant change in fact or law warrants such alteration. *See, e.g.*, *LaShawn A. ex rel. Moore v. Fenty*, 701 F. Supp. 2d 84 (D.D.C. 2010) (quoting *Rufo v. Sheriff of Suffolk County*, 502 U.S. 367, 384-385 (1992).[4] Such a motion would require the taking of evidence and legal arguments and a formal ruling by the Court, which would be subject to appeal. Because these steps have not been undertaken, the Court should not enter the order proposed by the Plaintiffs.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court decline to enter the proposed order on outpatient services submitted by the Plaintiffs. In the event the Court agrees to enter an order on outpatient services, the Defendants reserve their rights and

[4] *LaShawn A.*, like most of the reported cases dealing with the modification of a remedial order in an institutional-reform case, arises from a defendant's attempt to modify an adverse judgment or a consent decree. It would be somewhat anomalous for a prevailing plaintiff to seek to modify a judgment in its favor, but there is no reason why the rule articulated in *Rufo* would not apply with equal force: i.e., that the judgment can only be modified pursuant to a Rule 60(b)(5) motion, and that the movant must demonstrate the necessity for the proposed change. The Defendants submit that the Plaintiffs could not meet that standard here, particularly in light of the myriad changes to the outpatient service that Defendants have already agreed to implement. There simply is no necessity for the proposed change to the remedial order.

respectfully request the opportunity to submit specific objections to the text of the proposed order.

Respectfully submitted,

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Date: September 23, 2016

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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