IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CARLA FREW, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO. 3:93-CV-00065-RWS
v.	§	
	§	
DR. PHIL WILSON, *et al.*;	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants' Rule 60(b)(5) Motion to Vacate the First Modified Corrective Action Order: Outreach and Informing, Section III of the Corrective Action Order: Managed Care, and Related Outreach and Informing Consent Decree Paragraphs (Docket No. 1298). The Court heard argument on the motion on November 10, 2020. For the reasons set forth below, the motion is **GRANTED**.[1]

BACKGROUND

A detailed recitation of the background of this case is unnecessary for the purposes of this motion and can be found in previous opinions.[2] At a high level: Plaintiffs filed this lawsuit on September 1, 1993, alleging that Defendants (the successive commissioners of the Texas Health and Human Services Commission (HHSC) and the Texas Department of Health (TDH)) did not adequately provide Early, Periodic Screening, Diagnosis, and Treatment (EPSDT) services to

[1] Because the Court grants Defendants' motion under Prong 1 of Rule 60(b)(5) of the Federal Rules of Civil Procedure, the Court does not address the parties' arguments under Prong 3.

[2] *See Frew v. Gilbert*, 109 F. Supp. 2d 579 (E.D. Tex. 2000); *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002); *Frew v. Hawkins*, 540 U.S. 431 (2004); *Frew v. Hawkins*, 401 F. Supp. 2d 619 (E.D. Tex. 2005); *Frew v. Seuhs*, 775 F. Supp. 2d 930 (E.D. Tex. 2011); *Frew v. Janek*, Case No. 3:93-cv-65, 2013 WL 6698378 (E.D. Tex. 2013).

Texas Medicaid recipients under the age of 21 as required by 42 U.S.C. §§ 1396a(a)(43) and 1396d(r). The EPSDT program is now referred to as "Texas Health Steps," or THSteps, and is administered jointly by the federal government and the HHSC. Plaintiffs' class is all Texas youth eligible to receive Medicaid. Plaintiffs' complaint sought injunctive relief to ensure that the state complied with the Medicaid Act.

I. The Consent Decree (Docket No. 135)

In July 1995, following extensive settlement negotiations, the parties proposed a Consent Decree. The Court approved the decree on February 16, 1996. Docket No. 135. The Decree is a court-enforced settlement agreement that sets forth a compliance plan for the EPSDT program. It was not intended to resolve all the contested issues between the parties; rather, it reduced the nature and scope of the litigation. The Decree discusses in detail the areas in which the EPSDT program was deficient, sets goals and requirements for improvements and establishes deadlines for the implementation of those improvements.

In July 1998, Plaintiffs moved to enforce the Decree, arguing that Defendants had failed to comply with several provisions. Docket No. 208. Defendants opposed the motion, arguing that their efforts were sufficient and that, regardless, the Eleventh Amendment barred the Court from enforcing the Decree. In 2000, this Court held that Defendants had failed to comply with several of the Decree's provisions and that the Eleventh Amendment did not bar enforcement of the Decree against Defendants. On appeal, the United States Court of Appeals for the Fifth Circuit disagreed and held that the Eleventh Amendment barred enforcement of portions of the Decree that were not specifically mandated by the Medicaid Act. The United States Supreme Court reversed the Fifth Circuit, holding that the Decree was enforceable pursuant to *Ex Parte Young*, 209 U.S. 123 (1908),

because the Decree addressed federal interests. *See Frew v. Hawkins*, 540 U.S. 431 (2004). The case was remanded to this Court for continued oversight.

II. The Corrective Action Orders (Docket Nos. 637, 663)

In November 2004, Defendants moved to terminate or modify the Decree under Rule 60(b)(5) of the Federal Rules of Civil Procedure. Docket No. 406. Defendants argued that, even though they had not yet satisfied their obligations under the Decree, their efforts had brought them into compliance with the Medicaid Act. The Court denied Defendants' motion, holding that compliance with federal law was not the sole object of the Decree. Defendants' appeals to the Fifth Circuit and the Supreme Court were unsuccessful.

Plaintiffs later filed three additional motions relating to enforcement of the Decree. *See* Docket Nos. 428, 429, 607. In 2007, the parties reached an agreement on the pending motions that set forth corrective action plans for 11 areas of the EPSDT program addressed in the Decree. The parties filed their proposed agreement with the Court on April 27, 2007. Docket No. 637. The Court orally approved the agreements at a hearing on July 9, 2007, and subsequently entered the agreement as the Corrective Action Order (CAO) or "Remedial Order" on September 5, 2007. Docket No. 663.

The CAO contains 11 particularized orders for enforcing specific portions of the Decree. *See* Docket No. 663 at 13 ("Indeed, each of the eleven sub-proposals addresses important topics that require improvement so class members can receive health care that they need and are entitled to receive."). Two CAOs are relevant to the present motion: Outreach and Informing (Docket No. 746) and Managed Care (Docket No. 637-6).

APPLICABLE LAW

Rule 60(b)(5) permits a party to obtain relief from a judgment or order if: (1) the judgment has been satisfied, released or discharged; (2) it is based on an earlier judgment that has been reversed or vacated; or (3) applying it prospectively is no longer equitable. "Rule 60(b)(5) serves a particularly important function in . . . institutional reform litigation" because "injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." *Horne v. Flores*, 557 U.S. 433, 447–48 (2009) (internal quotation marks and citations omitted). Indeed, "institutional reform injunctions often raise sensitive federalism concerns." *Id.* at 448. "Federal concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities." *Id.* Consent decrees often "go well beyond what is required by federal law" and may "improperly deprive future officials of their designated legislative and executive powers." *Id.* (citing *Frew*, 540 U.S. at 441). "Where state and local officials inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents, they are constrained in their ability to fulfill their duties as democratically-elected officials." *Id.* at 449–50 (internal quotation marks omitted). Accordingly, the Court must "exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the States' obligations is returned promptly to the State and its officials." *Frew*, 540 U.S. at 442.

ANALYSIS

Defendants move the Court to vacate the First Modified Corrective Action Order: Outreach and Informing ("O&I CAO," Docket No. 746), Section III of the Corrective Action Order:

Managed Care ("Managed Care CAO," Docket No. 637-6) and the related Consent Decree paragraphs regarding Outreach and Informing: 10–74, 95–96, 176–183 and 193. Defendants first argue, under Prong 1 of Rule 60(b)(5), that they have complied with the Consent Decree paragraphs through their completion of the requirements of each CAO, thereby satisfying the Decree. This Court's previous orders make clear that "[o]nce Defendants comply with that part of the Decree and the related section of the Corrective Action Order, then the court may terminate that part of the Decree and the related section of the Corrective Action Order" and that the CAOs were intended to "provide[] a clear potential end point for Defendants' obligations under the Consent Decree." *See, e.g.*, Docket No. 663 at 15.

The outreach and informing provisions of the Decree require Defendants to "effectively inform recipients about the EPSDT program." Docket No. 135 ¶ 11. To accomplish this objective, Defendants must engage in outreach in a variety of ways and formats, including by providing written information, oral informing and oral outreach, coordinating with other agencies and disseminating media. *Id.* ¶ 12. The O&I CAO clarifies and supplements the requirements of the outreach and informing provisions of the Decree. *See* Docket No. 746.

Defendants submit dozens of exhibits comprising thousands of pages that they allege demonstrate compliance with their outreach and informing obligations under both the Consent Decree and the relevant CAOs. *See* Docket Nos. 1298–1318. Plaintiffs dispute Defendants' representations on each point and contend that a strong corrective action plan is necessary to remedy Defendants' ongoing violations. Docket No. 1379 at 3–4. The Court will examine Defendants' arguments that they have complied with their obligations under each of the O&I CAO, Section III of the Managed Care CAO, and all related Consent Decree provisions, as well as Plaintiffs' arguments in response, in turn.

I. Defendants' Compliance with the O&I CAO

a. Section I

The O&I CAO's first section, as modified in 2009, comprises 15 paragraphs. It requires Defendants to conduct a study to assess reasons why members of Plaintiffs' class miss checkups, implement five outreach and informing strategies based on the results of the study and conduct another study of the effectiveness of those strategies. Docket No. 746 ¶¶ 1–9. The CAO defines "effectiveness" to mean "the impact on checkup participation rates." *Id.* ¶ 8. Upon completion of the second study, Plaintiffs and Defendants are required to meet and confer on whether a "corrective action plan" is necessary. *Id.* ¶ 10. If they agree that it is, Defendants must implement the plan and conduct a third study. *Id.* ¶¶ 11–15. If the parties are unable to agree on the need for corrective action, the Court will resolve the dispute on a motion filed by either party. *Id.* ¶ 10.

Defendants submit that they have completed the first section of the O&I CAO. Docket No. 1298 at 13–25. In Defendants' view, only paragraphs 1 through 10 create mandatory, enforceable obligations; they contend that, because they are otherwise in compliance with federal informing requirements and with the outreach and informing provisions in the Consent Decree, they do not need to develop, implement and study the impact of a corrective action plan as provided in paragraphs 11 through 15. *Id.* at 32.

Plaintiffs dispute both of Defendants' propositions. Plaintiffs first contend that several flaws in the design and implementation of the outreach study preclude any finding that Defendants have complied with the O&I CAO. Docket No. 1379 at 16. Specifically, Plaintiffs argue that (1) the study involved a non-representative sample because it excluded over two-thirds of Plaintiffs' class by limiting the sample to only children with at least an 11-month uninterrupted period of Medicaid eligibility, *id.* at 21; (2) geographical errors in outreach strategy implementation limited

researchers' ability to analyze strategy effectiveness, *id.* at 24; and (3) Defendants compromised the study's independence by threatening to withhold payment after receiving a draft of the vendor's final report, *id.* at 25–26. Second, Plaintiffs contend that Defendants were required to develop and implement a corrective action plan as part of their outreach and informing efforts, and their failure to do so and comply with O&I CAO paragraphs 11 through 15 are fatal to their motion. *Id.* at 30; *see also* Docket No. 1422 at 8.

Defendants have complied with the O&I CAO's first section. Plaintiffs' objections to the Mercer studies rest on speculation and attorney argument; they submit no expert or other testimony, or any other evidence, that would either support a finding of statistical unreliability or show that the excluded population would meaningfully change the study's results. Defendants, on the other hand, submit substantial unrebutted evidence regarding the studies' statistical validity and reliability. *See, e.g.*, Docket No. 1412 at 34–35, 37; Docket No. 1298-3 ¶¶ 9–27, 73, 86.[3] Similarly, Plaintiffs have failed to demonstrate that the zip code errors in the outreach and informing strategy implementation resulted in measures that failed to substantially comply with the CAO. Plaintiffs appear to imply that the fact that the strategies did not proceed exactly as planned means that they did not comply with CAO requirements, but that is not necessarily the case. Defendants have submitted unrebutted evidence that, despite the zip code errors, the strategies were implemented in single geographical areas including both urban and rural counties, which is all that the CAO required, geographically speaking. *See* Docket No. 1412 at 42; Docket

[3] Plaintiffs also try to have it both ways by arguing that the study was ineffective and statistically unreliable but also demonstrated the need for corrective action that Defendants should immediately implement. If that was true, however, Plaintiffs could conceivably force corrective action, as it attempts to now, and then, later, oppose a second motion to vacate on the basis that the ineffective study failed to comply with the CAO. Both of Plaintiffs' propositions cannot be true: either the study, effectively conducted, revealed paths forward or, failing to commission an appropriate study, Defendants must re-do it. Plaintiffs do not ask the Court to order Defendants to re-do the study, belying their assertion that it was ineffective. And if they had, the appropriate time to seek such relief was when or shortly after Mercer completed the study.

No. 746 at 6–7. Finally, Plaintiffs' complaints about Mercer's independence are unfounded. Defendants submit evidence showing that Mercer operated independently throughout the process. Docket No. 1412 at 48; Docket No. 1298-3 ¶¶ 86–87; Docket No. 1302-1 ¶ 37. Both parties submitted comments on Mercer's draft report, and Mercer considered them all. Docket No. 1412 at 49; Docket No. 1298-3 ¶¶ 86-87. The whole point of the comment period was to inform Mercer's preparation of the final report, and the fact that Defendants' comments referring to contract deliverables engendered changes does not necessarily mean that Mercer lost its independence.

As for Plaintiffs' second contention—that Defendants should have developed and implemented corrective action plans based on the results of the outreach studies—that also fails. By its terms, the O&I CAO makes such plans optional. *See* Docket No. 746 at 9 ("The parties will begin to confer . . . to determine what kind of corrective action plans, ***if any***, Defendants will implement" (emphasis added)). As the name "corrective action plan" implies, there must be something for Defendants to correct. Plaintiffs submit that the outreach study showed that Defendants could implement "more effective" outreach. But that was not the purpose of the outreach study, nor was it the purpose of the CAO generally. Rather, the CAO's purpose was to bring Defendants into compliance with the provisions of the Decree that this Court held it had violated, and the study was designed to determine how to make that happen. Docket No. 663 at 13 ("The proposal also requires studies to determine the extent and likely causes of various problems ***with Defendants' decree compliance***." (emphasis added)). If Defendants are already in compliance with the relevant Decree provisions, then there is nothing for Defendants to correct; an order directing them to develop a plan anyway is beyond this Court's power. *See Horne*, 557 U.S. at 433 (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)) ("If a federal consent decree is

not limited to reasonable and necessary implementations of federal law, it may improperly deprive future officials of their designated legislative and executive powers.").

As explained in more detail below, Defendants have complied with their obligations under the outreach and informing paragraphs of the Consent Decree. They therefore were not required to design and implement a corrective action plan and study it pursuant to O&I CAO Section I ¶¶ 11–15. Because Defendants complied with their enforceable obligations under O&I CAO Section I, the Court will vacate that section.

b. Section II

Section II of the O&I CAO requires Defendants to send checkup due, reminder and follow-up letters. Docket No. 746 at 12. Defendants contend that they comply with this provision and point to the fact that they mailed nearly eleven million due and reminder letters to THSteps recipients in State Fiscal Year 2014. Docket No. 1298 at 34. Plaintiffs dispute Defendants' compliance, arguing that Defendants' failure in 2014 to send more than one million necessary outreach letters indicates a lack of necessary oversight that defeats any claim of substantial compliance. Docket No. 1379 at 30. Plaintiffs submit that "[t]here are clearly no assurances that outreach contractors' performance will significantly improve, or that Defendants' willingness or ability to verse their outreach contractor will become effective enough to ensure CAO or Decree compliance." *Id.* at 31.

Defendants' reply, in arguing that the 2014 failure does not defeat its motion, explains why Defendants' contractor, MAXIMUS, failed to send more than one million letters. Defendants state that "[w]hile conducting a review of the THSteps outreach letter process in December 2014, HHSC and MAXIMUS staff members identified errors in the MAXed system functionality that had impacted some written offers of outreach from December 2013 through December 2014." Docket

No. 1412 at 22. The first error excluded recipients who were excluded from participation from managed care and affected 2,870 of 12,228,255 records. *Id.* at 22–23. The second error "incorrectly interpreted records for medical and dental checkup due letters, and records for medical and dental checkup reminder letters, during the same month, and for the same recipient, as duplicative" and affected 1,665,478 of 13,474,513 records. *Id.* at 23–24. Upon discovering the errors, MAXIMUS implemented manual processes and began designing automatic record-creation to rectify both. *Id.* at 25. It then submitted a corrective action plan at Defendants' request. *Id.* at 25–26. At the hearing, Defendants represented, and Plaintiffs conceded, that no further errors have impacted the outreach letter program. Plaintiffs identify no other basis for its opposition on this section of the O&I CAO.

Because the MAXIMUS technological errors impacted only a relatively small portion of recipients and have not reoccurred at any point in the intervening six years, Defendants are in substantial compliance with O&I CAO Section II. Because the section does not provide for any action items or otherwise create enforceable obligations apart from those already provided for in the Consent Decree, *see* Docket No. 746 at 12, the Court will vacate that section.

c. Section III

Section III of the O&I CAO recites Defendants' already-completed design change for the monthly Med-ID card "to clarify the availability of dental care and the appropriate scheduling of check ups" and does not define any action items or otherwise create enforceable obligations. Docket No. 746 at 13. Defendants confirm that they effectuated this change in May 2007. Docket No. 1298 at 35. Plaintiffs do not dispute the proper characterization of Section III or Defendants' compliance with it; they simply express concern that, because the cards do not provide notice of when a checkup is due like the old monthly paper card had, "other ways of informing families

about checkup scheduling [are] even more important," an obligation Plaintiffs say Defendants failed to comply with during the 2014 outreach letter errors. Docket No. 1379 at 31–32.

Plaintiffs' response is unrelated to any obligations Defendants may have under O&I CAO Section III. The Court will vacate that section.

d. Section IV

Section IV of the O&I CAO also recites an already-completed action item: Defendants' initiation of "a program of contacting and training of all Medicaid eligibility workers who deal with class members." Docket No. 746 at 13. Defendants provide details on their program, which they implemented in 2007, through witness declarations. Docket No. 1298 at 35. Plaintiffs argue that Defendants are nonetheless not complying because they "have failed to assure that their eligibility workers submit 'extra effort referrals' or that their outreach contractor responds appropriately to them." Docket No. 1379 at 32. Plaintiffs submit that Defendants cannot be fulfilling their responsibilities under this Section of the CAO because too few referrals are actually submitted. *Id.*

Plaintiffs' opposition is divorced from the language of the CAO, which only addresses Defendants' existing training program and does not define any action items or provide for enforceable obligations. Regardless of whether Plaintiffs have improperly inserted "results-oriented measures" into the CAO and related Consent Decree paragraphs, which the Court discusses in more detail below with respect to Defendants' obligations under the Decree, Plaintiffs cannot argue that Defendants have not complied with a CAO section that does not require Defendants to do anything, let alone provide a benchmark for actually submitted referrals. The Court will vacate this section.

e. Section V

Section V of the O&I CAO recites two paragraphs outlining Defendants' plans to "effectively coordinate all Medicaid and child health-focused approaches . . . towards class members and their families" and for "coordination with other state agencies and state contractors that provide health or public benefit information to class members or their families." Docket No. 746 at 13–14. Defendants describe these plans, which they implemented in 2007, in their motion. Docket No. 1298 at 36–38. Plaintiffs do not substantively dispute Defendants' compliance, stating simply that, if Defendants indeed complied with Section V, there would be no "pressing need to relieve [Defendants] of their Court-ordered outreach obligations so they can avoid unnecessarily duplicative outreach messages to the children's families." This response fails to address the substance of Defendants' request and improperly conflates Defendants' alternate requests under Prongs 1 and 3 of Rule 60(b)(5). The Court will vacate Section V.

f. Section VI

Section VI of the O&I CAO recites Defendants' obligation to produce outreach reports pursuant to Decree paragraphs 60 and 61 and include them in their quarterly monitoring reports. Docket No. 746 at 14. Defendants have done so consistently since 2007. Docket No 1298 at 38. Plaintiffs concede this but question the reports' accuracy given the MAXIMUS errors discussed above. Docket No. 1379 at 33–34. Plaintiffs further argue that reports about outreach effectiveness should continue until checkup rates increase. *Id.* Because Plaintiffs concede that Defendants comply with Section VI and do not identify a point at which Defendants may stop providing monthly reports, their position must be rejected. *See Frew v. Janek*, 820 F.3d 715, 725 (5th Cir. 2016) (*Frew VII*) ("In the absence of [a] benchmark, the numbers are just numbers—not, as we have emphasized, meaningful parts of a clearly defined roadmap aimed at supporting EPSDT

recipients in obtaining the health care services they are entitled to." (quotations omitted)). The Court will vacate this section.

g. Section VII

Section VII of the O&I CAO outlines the parties' meet and confer obligations to determine whether further action is needed to bring Defendants into compliance with the Consent Decree. Docket No 746 at 14. Defendants do not separately address this section in their motion, explaining on reply that corrective action is unnecessary in view of Defendants' full compliance with federal outreach requirements and the outreach paragraphs of the Decree. Docket No. 1412 at 64. Plaintiffs reiterate the need for further action outlined above. Docket No. 1379 at 34–35.

For the reasons the Court discussed above, no further action is required under the O&I CAO. The Court will vacate Section VII and, with it, the O&I CAO in its entirety.

II. Defendants' Compliance with Section III of the Managed Care CAO

Section III of the Managed Care CAO defines Defendants' obligations to extend special outreach and informing efforts to the children of migrant farmworkers. *See* Docket No. 637-6 at 7–8. It consists of seven bullet points. *See id.* Defendants contend that they have complied with each one. *See* Docket No. 1298 at 38–42. Plaintiffs raise only two issues in response: Defendants' lack of evidence "that [Defendants' actions] have resulted in more than a minute amount of actual acceleration of services to the children" and Defendants' failure "to provide a true system of rewards and sanctions" for HMOs based on outreach and services to migrant children. Docket No. 1379 at 38.

Plaintiffs' first assertion is without merit. Though Plaintiffs couch their opposition in terms of Defendants' lack of evidence, Defendants did not need to prove actual acceleration of services to children to demonstrate compliance with Section III of the Managed Care CAO. The first bullet

point only requires that Defendants "make acceleration of services to enrollees who are migrant farmworker children ('FWC') a contract requirement." Docket No. 637-6 at 7. Defendants have shown that they have done so. *See* Docket No. 1298 at 39. Plaintiffs might have had more success if they had come forward with evidence of their own that these efforts have borne no results[4], but that is not what they did. Instead, they cited to an excerpt of Defendants' quarterly monitoring report which outlined HMOs' efforts to comply with the Consent Decree. *See* Docket 1379 at 38 (citing Defendants' most recent Quarterly Monitoring Report, reporting on Medicaid HMOs' migrant-related activities). Since the original issue in this respect was that Defendants' managed care companies did not "make ***any*** efforts to accelerate services to class members whose parents are migrant farmworkers," *Frew I*, 109 F. Supp. 2d at 633 (emphasis added), evidence that MCOs and/or HMOs ***are*** making these efforts will not defeat Defendants' Rule 60(b)(5) motion.

Plaintiffs' second basis of opposition is equally unavailing. The Managed Care CAO does not require that Defendants implement financial rewards and sanctions; instead, the rewards and sanctions need only "be consistent with the rewards and sanctions developed in connection with other sanctions of this Corrective Action Order" and "be in accordance with federal and state law as well as consistent with the terms of any contract then in place." Docket No. 637-6 at 8. Plaintiffs have not provided any evidence that Defendants' system fails to comply with these requirements, while Defendants represent that they do. That Plaintiffs are displeased with the results of the system says nothing about Defendants' compliance with their obligation to implement the system.

[4] Defendants argue that Plaintiffs have once again "improperly attempt[ed] to insert results-based measures into the CAO, when Defendants did not agree to such numbers-based measures." Docket No. 1412 at 65. But if Plaintiffs could show that, despite the inclusion of an acceleration-of-services provision in Defendants' MCO contracts, no acceleration was actually occurring, then one could reasonably conclude that Defendants' MCOs breached their contracts with Defendants and that Defendants have done nothing to resolve the issue. Such a finding would indicate that their efforts are mere lip service. Plaintiffs have not done so, nor is it clear that they could.

Because Defendants have submitted substantial evidence that they have complied with their obligations under Section III of the Managed Care CAO, and because neither of Plaintiffs' bases for opposing Defendants' requested relief has merit, the Court will vacate that section.

III. Defendants' Compliance with Consent Decree ¶¶ 10–74, 95–96, 176–183 and 193

Defendants finally contend that they have substantially complied with all enforceable terms in paragraphs 10–74, 95–96, 176–183 and 193 of the Consent Decree and that, as a result, those paragraphs should be vacated. Docket No. 1298 at 43. Defendants submit with their motion a table outlining each of their obligations and the steps they have taken and continue to take to comply. *See* Docket No. 1301-2. Plaintiffs' bases for arguing Defendants' non-compliance fall into three broad categories: (1) Defendants have failed to show that their outreach has been "effective"; (2) the 2014 MAXIMUS issue and quarterly monitoring reports of eligibility office compliance reveal a chronic lack of Decree-required oversight; and (3) the lack of actual extra effort referrals demonstrates Defendants' failure to encourage such requests. *See* Docket No. 1379 at 39–50. The Court already rejected Plaintiffs' arguments based on the 2014 MAXIMUS issue in the context of the O&I CAO, and the same reasoning applies here; accordingly, the Court only discusses the first and third assertions below. Plaintiffs otherwise concede that Defendants are in compliance with paragraphs 15, 16, 59 and 179, so the Court will vacate those paragraphs without further analysis.[5]

[5] In 2000, this Court found that Defendants had violated Decree paragraphs 32 and 52. *See Frew I*, 109 F.Supp.2d at 599. Plaintiffs now contend that Defendants are violating several additional provisions that the Court never addressed. *See generally* Docket No. 1379. Against a backdrop in which Defendants have always complied with the other outreach provisions in the Decree, Plaintiffs bear the burden of showing that Defendants have violated additional Decree provisions. They have not carried that burden.

a. Whether Defendants' Outreach Efforts Have Been "Effective"

Plaintiffs submit that "the key test of Defendants' outreach compliance" is accomplishing the Consent Decree outreach provisions' stated purpose to "effectively inform recipients about the EPSDT program . . . so that recipients can fully utilize EPSDT services, including medical and dental check ups." Docket No. 1379 at 39 (citing Consent Decree ¶¶ 10, 11). Plaintiffs contend that Defendants have failed to show that their outreach efforts are effective because there is no evidence that they "have reached families in ways that help large numbers of children access needed health care" or "helped families overcome barriers and access needed health care for the children." *See, e.g.*, Docket No. 1379 at 39, 40. Defendants respond that Plaintiffs misstate the appropriate standard. Defendants argue that they need not achieve any "objectives" of the Decree; rather, they "need only establish that they are in substantial compliance with the Decree's enforceable terms." Docket No. 1412 at 9. Defendants further claim that the Fifth Circuit has already rejected Plaintiffs' proposed definition of "effective" and that Paragraphs 10 and 11 of the Consent Decree are unenforceable recital paragraphs. *Id.* at 10, 17. Plaintiffs reply that "effective" outreach is an enforceable term. They point to the fact that the Decree uses "effective" or "effectively" 11 times and that the O&I CAO uses them 10 times and defines "effectiveness" to mean "the impact on checkup participation rates." Docket No. 1422 at 9.

Two Fifth Circuit opinions in this case inform the Court's approach to defining "effective" as it is used in the Consent Decree's outreach provisions. First, in 2015, the Fifth Circuit addressed Plaintiffs' argument under Decree ¶ 129 that Defendants' compliance with their obligation to "effectively inform pharmacists about EPSDT" could be measured by recipients who receive their prescription drug benefits. *Frew v. Janek*, 780 F.3d 320, 329 (5th Cir. 2015) (*Frew VI*). The Fifth Circuit rejected this assertion because "[r]eading ¶ 129 as a whole . . . reveal[ed] that 'effectively'

functions to require that all 'presentations,' 'articles,' and 'mail out' initiatives conducted by Defendants *convey information* effectively." *Id.* (emphasis original). The court concluded that "[t]o infer a wholesale, results-oriented reevaluation of Defendants' efforts from this one word, taken out of context, would be wholly inconsistent with the rules of contract interpretation." *Id.*

The Fifth Circuit again addressed interpretation of the Decree in 2016. Applying principles of Texas contract interpretation and analyzing this Court's interpretation of the Decree in 2000 and 2005, the court rejected both parties' proposed interpretation of "shortage" of Medicaid providers and adopted one originally embraced by this Court. *Frew VII*, 820 F.3d at 723–26 (2016). The Fifth Circuit concluded that, though it owed no deference to this Court's contract interpretations, this Court's earlier orders "are grounded on and articulate the proper interpretation of 'shortage.' " *Id.* at 726. The Fifth Circuit also reasoned that, because the Court defined the term in two major orders prior to the negotiation of the CAOs, one may "assume that the parties intended to use this same definition in the eleven particularized orders." *Id.*

These decisions instruct the Court to consider the full context in which "effective" is used in the Consent Decree and to look to the Court's earlier interpretation of the word, if any, because it likely informed the parties' own understandings when they negotiated the CAOs.

This Court previously considered the meaning of "effective" outreach and informing and identified three possible interpretations supported by the language of the Consent Decree: (1) outreach that "is simply well-communicated to those plaintiffs who are contacted"; (2) "outreach that succeeds in reaching the maximum possible number of people"; or (3) "success in persuading listeners to gain access to services." *Frew I*, 109 F. Supp. 2d at 596–97. Here, Defendants advance the first definition, Plaintiffs the third. The Court found that all of these purposes for outreach and informing "appear repeatedly within the 'four corners' of the nearly one hundred pages of the

decree." *Id.* at 598. Ultimately, the Court decided that "the precise meaning of 'effective' need not be determined" because Defendants had been ineffective "in all three senses of the word." *Id.* In 2005, however, in declining to modify or set aside the Decree, the Court specifically found that "much of the evidence of Defendants' improved outreach and informing efforts is undermined by this lack of improvement in actual provision of medical checkups and dental services." *Frew II*, 401 F.Supp.2d at 666.

With these observations in mind, the parties chose to define "effectiveness" in the O&I CAO to mean "impact on checkup participation rates." Docket No. 746 at 9. And Defendants' quarterly monitoring reports also adopt the checkup participation measure for effectiveness of outreach and informing. *See, e.g.*, Docket No. 1778-3 at p. 92 ("The purpose of this report is to demonstrate the effectiveness of outreach by displaying the number and percent of Texas Health Steps recipients who received a medical and/or dental checkup after an activity type during a particular month."). Thus, contrary to Defendants' arguments, Plaintiffs are not inappropriately attempting to insert results-oriented measures into the Decree. Docket No. 1412 at 60. Rather, their approach is consistent with this Court's prior orders and with the evidence of the parties' own understandings of the term.

Nonetheless, Plaintiffs' opposition fails. First, it eschews actual benchmarks. Nowhere in Plaintiffs' opposition do they explain how medical and/or dental checkup rates would show that Defendants' outreach efforts are "effective," fatally undermining their opposition. *Cf. Frew VII*, 820 F.3d at 725 ("Plaintiffs argue that various class-member-to-provider ratios show stark shortages, but they do not tell us what an acceptable class-member-to-provider ratio would be. In the absence of this benchmark, the numbers are just numbers—not, as we have emphasized, meaningful parts of a clearly defined roadmap aimed at supporting EPSDT recipients in obtaining

the health care services they are entitled to." (quotations omitted)). Second, by any of the measures identified in the Court's 2000 order, Defendants' outreach efforts are effective. If "effective" relates to messages' content, then Defendants have satisfied their obligations and Plaintiffs do not argue otherwise. *See, e.g.*, Docket No. 1379 at 39 (admitting that Defendants' outreach materials "include messages that encourage the full and appropriate use of health care services."). If it means reaching the maximum number of people, Plaintiffs do not dispute that Defendants provide outreach in all areas of the state. *See* Docket No. 1379 at 43. And if it means impact on checkup participation rates, Defendants' efforts have improved the overall rate as well as the rate of recipients that receive checkups after having received outreach, which was the measure that this Court referred to in 2000. *See* Docket No. 1412 at 10 n.10; Docket No. 1315-2 ¶ 13 & Att. B; *Frew I*, 109 F. Supp. 2d at 599 ("[O]nly about 25% of class members who are informed of the program by defendants actually receive medical checkups after having received outreach").

Indeed, the fact that Defendants have improved checkup participation rates is, by itself, enough to defeat Plaintiffs' opposition. Both parties have indicated their understanding that "effectiveness" is the measure of Defendants' "impact" on checkup participation rates. Presumably, "effective" outreach would improve those numbers. Defendants have submitted evidence that checkup participation rates have steadily increased since 2000, indicating that their efforts are effective. Because neither the Consent Decree nor the O&I CAO provide measures for *how* "effective" the outreach efforts need to be for Defendants to have substantially complied with their obligations thereunder, any sustained degree of effectiveness—*i.e.*, any sustained indication of improvement—suffices. Defendants have made that showing, and Plaintiffs' efforts to undermine it—relying on a single year-over-year decrease in participation rate, which, without

context, is nothing more than statistical noise—cannot defeat the longer-term trend demonstrating that Defendants have been steadily improving checkup participation rates in Texas.

Finally, the Court notes that Defendants' efforts continue to be more than minimally effective even under Plaintiffs' interpretation of the term—in Fiscal Year 2019, the most recent for which data is available, the percentage of Plaintiffs aged 1 to 20 who received preventative dental services in Texas was 67.3%, significantly better than the national median of 49.1%. *See Percentage of Eligibles Who Received Preventive Dental Services: Ages 1 to 20*, MEDICAID.GOV, *https://www.medicaid.gov/state-overviews/scorecard/eligibles-who-received-preventative-dental-services/index.html* (last visited December 2, 2020).

Accordingly, Defendants have demonstrated that their outreach and informing efforts are effective.

b. Defendants' Extra Effort Referrals

As they did in the context of O&I CAO Section IV, Plaintiffs contend that Defendants have not complied with their Decree obligations to encourage requests for additional information about THSteps because they receive so few actual "extra effort referrals." Docket No. 1379 at 42. Defendants argue that Plaintiffs are injecting results-based measures into Decree provisions that do not require them. Docket No. 1412 at 60. Plaintiffs reply that their "concern is not just that 'extra effort' EPSDT informing is ineffective at encouraging the children's use of needed health care services" but that "almost none of this activity is taking place at all." Docket No. 1422 at 29.

The Decree does not require that a certain number of extra effort referrals be submitted in a given time frame; it does not require that they be submitted at all. Instead, the Decree requires that Defendants implement a system for providing such referrals "upon request." *See* Docket No. 135 ¶ 23. Defendants have submitted evidence showing that such a system is in place. The fact

that it receives few requests that trigger the creation of an extra effort referral does not impact their compliance with obligations under the Decree. Plaintiffs' opposition is without merit.

c. Conclusion on Consent Decree Paragraphs

Plaintiffs have not defeated Defendants' showing that Defendants have substantially complied with their obligations under ¶¶ 10–74, 95–96, 176–183 and 193 of the Consent Decree. Accordingly, the Court will vacate each of those paragraphs.

CONCLUSION

"When a Rule 60(b)(5) movant has established both the absence of an ongoing violation of federal law and a future commitment to remain in compliance with federal law, federalism concerns should inform a court's flexible determination as to how a consent decree will be modified." *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1203 (10th Cir. 2018). "A movant may [] establish its commitment to future compliance through a record of sustained good-faith efforts to remedy federal violations and, to the extent possible, eliminate the vestiges of the federal violation." *Id.* (citing *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 248–49 (1991)). For the reasons set forth above, Defendants have made that showing. Their motion to vacate (Docket No. 1298) is **GRANTED**. The Court **VACATES** the First Modified Corrective Action Order: Outreach and Informing (Docket No. 746), Section III of the Corrective Action Order: Managed Care (Docket No. 637-6) and Consent Decree ¶¶ 10–74, 95–96, 176–183 and 193 pursuant to Prong 1 of Rule 60(b)(5) of the Federal Rules of Civil Procedure.

So ORDERED and SIGNED this 11th day of December, 2020.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE