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

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

ORDER

Before the Court is Defendants' Opposed Motion to Modify Consent Decree Paragraph 306 Under Rule 60(b)(5) of the Federal Rules of Civil Procedure. Docket No. 1923 (amending Docket No. 1922). The motion was fully briefed. Docket Nos. 1923, 1930–32. The Court held a hearing on the motion on January 26, 2023 (Docket No. 1968) (Hr'g Tr.). For the reasons stated below, Defendants' motion is **GRANTED**.

BACKGROUND

This case has a long, well-documented history. Accordingly, "[o]nly a few points about the lengthy procedural history of [the] case . . . need be described for the discrete [motion] we face." *Frew v. Traylor*, 688 F. App'x 249, 251–52 (5th Cir. 2017), as revised (Apr. 28, 2017) ("*Traylor*"); *see also Frew v. Janek*, 780 F.3d 320, 323–27 (5th Cir. 2015) ("*Janek*") (providing a more detailed history of the litigation). Namely,

> [i]n 1996, the district court entered a consent decree aimed at "enhancing the availability of health care services, eliminating barriers that have the effect of preventing access to services, and more effectively informing recipients that services are available and important to their current and future health." The Decree dictated that the state meet a range of objectives. Some examples include creating outreach units to spread information about [Early, Periodic Screening, Diagnosis

> and Treatment ("EPSDT")]; improving provider training on a number of issues, such as coverage of mental health screening and services for teenagers; and implementing accountability measures.
>
> More than a decade later, in 2007, Plaintiffs successfully obtained [an] agreed Corrective Action Order [("CAO")]. The [CAO] resulted from Plaintiffs' motions to enforce and to find Defendants in violation of the original decree. Each of the plans in the 2007 Order deals with a specific issue, such as transportation, health care provider training, and outreach efforts.

Traylor, 688 F. App'x at 252 (brackets omitted); *see also* Docket No. 135 (1996 Consent Decree) and Docket No. 663 (2007 CAO).

Paragraphs 306 and 307 of the Consent Decree read as follows:

> 306. For the duration of [the Consent] Decree, Defendants will make monitoring reports every January, April, July and October. The monitoring reports will include a chart and supporting documentation. Defendants will file the chart with the Court by the end of each month mentioned above. They will also serve the charts and supporting documentation on Plaintiffs' counsel at the same time.
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> 307. The chart will identify each paragraph in this Decree that obliges Defendants to act and each required action. The chart will further state the status of each activity. The parties will agree on the chart's content and may revise it from time to time.

Docket No. 135 at ¶ 306 ("Paragraph 306"), ¶ 307 ("Paragraph 307").

Defendants now move to modify Paragraph 306 to require annual monitoring reports as opposed to quarterly reports. With these facts in mind, the Court considers the merits of Defendants' motion.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 60(b)(5), a court may relieve a party from a final 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. FED. R. CIV. P. 60(b)(5). As this Court has previously explained:

> Rule 60(b)(5) serves a particularly important function in institutional reform litigation. [Namely,] injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances. Indeed, institutional reform injunctions often raise sensitive

> federalism concerns[, which] are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities. Consent decrees often go well beyond what is required by underlying statutes and may improperly deprive future officials of their designated legislative and executive powers . . . . Accordingly, federal courts must exercise their equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligation is returned promptly to the State and its officials.

Janek, 2013 WL 12177814, at *2 (quotations and brackets omitted) (citing *Horne v. Flores*, 557 U.S. 433, 448–50 (2009)).

DISCUSSION

The parties dispute whether prospectively enforcing Paragraph 306 of the Consent Decree and thereby requiring quarterly monitoring reports ("QMRs") is equitable under Rule 60(b)(5). *See generally* Docket Nos. 1923, 1930. Courts must take a "flexible approach" when considering a motion to modify a consent decree. *Horne*, 557 U.S. at 450. Under this approach, a party seeking modification of a decree bears the burden of establishing that (1) a significant change in fact or law warrants revision of the decree; and (2) that the proposed modification is suitably tailored to the changed circumstances. *Janek*, 2013 WL 12177814, at *3 (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 365, 383 (1992)). A court "abuses its discretion when it refuses to modify an injunction or consent decree in light of such changes." *Horne*, 557 U.S. at 447 (citation and quotations omitted). The Court finds that modification of Paragraph 306 is proper because Defendants have satisfied their burden under the flexible approach.[1]

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[1] Under the Local Rules, before filing an opposed motion, the parties must, "at a minimum," meet and confer in good faith via "a personal conference, by telephone or in person, between an attorney for the movant and an attorney for the non-movant." Local Rule CV-7(h). Should the parties fail to reach an agreement, the motion must be accompanied by a "certificate of conference" that, among other things, includes "a statement that discussions have conclusively ended in an impasse . . ." Local Rule CV-7(i).

Plaintiffs' argument that modification is improper because Defendants failed to comply with the above-described local rule is unpersuasive for several reasons. Docket No. 1930 at 1–3. First, Plaintiffs have submitted no evidence that demonstrates Defendants failed to meet and confer in "good faith." Second, Plaintiffs' assertion that Defendants' certificate of conference did not include a statement that the parties reached an impasse is factually incorrect. Defendants' certificate of conference clearly states that the parties "conferred via telephone . . . [and] further via email]" and "could not agree to the relief requested" in Defendants' motion. Docket No. 1923 at 9. Plaintiffs

As Defendants correctly note, this case has been pending for over 30 years. Defendants assert that, when the Consent Decree was entered, the primary purpose of Paragraph 306 was to "assist Plaintiffs and the Court with monitoring Defendants' current status of the EPSDT program and [their] compliance with the terms of the Consent Decree." Docket No. 1923 at 2. After the CAO was entered, Paragraph 306 "became a vehicle for [monitoring] the status of Defendants' progress toward completing the CAOs." *Id.* Plaintiffs do not dispute this assertion. *See generally* Docket No. 1930.

Defendants accordingly contend that it takes a "multi-step process" and "significant efforts spanning multiple state agencies and numerous vendors" to produce the QMRs.[2] *Id.* at 4–5. But because most of the CAOs and Consent Decree Paragraphs have been vacated, Defendants contend there is a lack of significant updates to the QMRs each quarter, and the reports now largely contain boilerplate language due to the current uniformity in service delivery. *Id.* at 3–4 (noting that 5 out of 11 CAOs have been vacated and 151 out of 308 Consent Decree Paragraphs have been

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seemingly fault Defendants for not continuing the meet and confer process after Plaintiffs' counsel sent his March 13, 2022 correspondence stating that, while "[Plaintiffs do not] agree to [Defendants'] specific and sweeping proposed change from quarterly to annual reporting with a couple of narrow exceptions, [they] remain willing to [continue the discussion . . . .]" But at this point, Defendants had at least satisfied the "minimum" requirements of the local rules, which ended in a clear disagreement between the parties. And it is true that Plaintiffs' counsel's correspondence reflects a disagreement concerning the substance of the present motion. Accordingly, Plaintiffs' argument is without merit.

[2] Defendants' assertions are based on the declaration of Michelle Erwin who is the current "Deputy Associate Commissioner for the Office of Policy in the Medicaid and [Children's Health Insurance Program (CHIP)] Services (MCS) Division at the Texas Health and Human Services Commission (HHSC)." Docket No. 1932-2 at ¶ 2. Plaintiffs argue that the Erwin declaration is improper expert testimony under Federal Rule of Civil Procedure 26(a)(2) and Federal Rule of Evidence 1006. Docket No. 1930 at 7. Plaintiffs, therefore, request that the Court not consider the Erwin declaration to support Defendants' motion.

Under Rule 26(a)(2), "a party must disclose to the other parties the identity of any witnesses it may use *at trial* to present evidence under" Federal Rules of Evidence 702, 703 or 705, which govern expert testimony. FED. R. CIV. P. 26(a)(2) (emphasis added). Rule 1006 similarly governs the ability to rely on summaries to prove content at trial. FED. R. EVID. 1006. The Court notes that the time for trial in this matter has long passed. Accordingly, the parties are currently disputing Defendants' post-judgment request for relief from the Consent Decree, not matters related to trial proceedings. Docket No. 1923. Thus, absent any authority to suggest it is improper to consider Defendants' supporting declaration for its Rule 60(b)(5) motion, the Court declines to exclude the Erwin declaration.

vacated—more than 50 of which consist of "non-substantive recitals or background information"). This has not, however, decreased the manpower it takes to produce the QMRs. *Id.* And because the necessary data is gathered from so many sources, Defendants are nonetheless tasked with viewing the reports to ensure they are "accurate, comprehensive, and readable." *Id.* at 4. Defendants now argue that there has been a significant factual change that warrants modification of Paragraph 306. *Id.* at 2. For the reasons stated below, the Court agrees.

First, Defendants have demonstrated multiple circumstances that warrant modifying Paragraph 306. *Rufo*, 502 U.S. 367 at 368 ("Modification may be warranted when changed factual conditions make compliance with the decree substantially more onerous, when the decree proves to be unworkable because of unforeseen obstacles, or when enforcement of the decree without modification would be detrimental to the public interest.").[3] As an initial matter, the burdensome nature of Defendants' review process warrants modifying the Consent Decree. Namely, given the substantial amount of boilerplate information that now exists within the QMRs, Defendants' review process essentially amounts to a tedious effort to spot minute changes within otherwise static text. *See, e.g.*, Docket No. 1923 at 4. In other words, Defendants are now spending numerous hours each quarter searching for a needle in a haystack.

This fact further underscores another reason that modification is proper. That is, despite Defendants' laborious efforts, it appears that Plaintiffs do not similarly endeavor to review the

[3] Plaintiffs' argument that modification is improper because Defendants should have anticipated a change in the scope of the case—*i.e.*, this is not an unforeseen obstacle—is unpersuasive. Docket No. 1930 at 4–5. The Court emphasizes that, under *Rufo*, modification may be proper if any of the cited circumstances exists. 502 U.S. 367 at 368 (using the modifier "or" as opposed to "and"). As such, the *Rufo* court found that anticipated circumstances do not completely foreclose modifications to the decree; rather, they create a "heavy burden to convince a court that [the defendants'] agreed to the decree in good faith, made reasonable effort[s] to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Id.* at 385. As explained herein, Defendants have satisfied that burden and also demonstrated multiple other reasons to modify Paragraph 306. Moreover, the Court finds that Defendants could not have anticipated that uniformed service delivery would substantially change the nature of the QMRs. Nor could they have anticipated that continued enforcement of Paragraph 306 would become detrimental to the public interest.

QMRs each quarter when they are produced. Docket No. 1923 at 6; *see also* Docket No. 1968 at 11:5–9. In fact, in more recent years, Plaintiffs have minimally relied on the QMRs, if at all. *Id.* (noting that in 2021 Plaintiffs' counsel spent 1.5 total hours reviewing the QMRs).[4] The Court also finds that this minimal reliance does not support Plaintiffs' position that it needs the QMRs "to analyze trends in Defendants' activities over time . . . ." Docket No. 1930 at 7; *see also* Docket No. 1968 at 9:14–20. If Plaintiffs have not been actively analyzing these trends in the past, the Court is not persuaded that it will begin actively assessing them now.

The Court, therefore, finds that requiring such an onerous effort each quarter to produce a report that is minimally reviewed by Plaintiffs' counsel is detrimental to the public interest because Defendants' resources could be instead allocated to more pertinent tasks that better serve their constituency. *Horne*, 557 U.S. at 449 ("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 . . . .").

Defendants have demonstrated that Paragraph 306 should also be modified because their proposed modification is a durable remedy. *Id.* at 450 ("If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper."); *see also Janek*, 2013 WL 12177814, at *3 ("Changed factual circumstances may also include when the objects of the decree have been attained and a durable remedy has been implemented."). Here, given Defendants' consistent compliance with providing quarterly QMRs in the past, the Court is confident that Defendants "will not resume their violations of [P]laintiffs' constitutional rights" if

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[4] Plaintiffs' argument that the reported billing entries do not adequately reflect their reliance on the QMRs is unavailing. Docket No. 1930 at 8. According to Plaintiffs' counsel, over the past five years, Plaintiffs have relied on the QMRs for "virtually all of" the motions they have filed. Docket No. 1968 at 11:24–12:6. But, based on a high-level review of the docket in this case, as best the Court can tell, the last time Plaintiffs relied on or referenced the QMRs to support their motions practice was in 2017—more than five years ago. Docket No. 1546-3.

they are instead required to report their progress on an annual basis. *Evans*, 701 F. Supp. 2d at 148 (defining a durable remedy as a remedy that "gives the court confidence that defendants will not resume their violations of plaintiffs' constitutional rights once judicial oversight ends."). As such, continued enforcement of a quarterly monitoring report requirement "is not only unnecessary, but [it is also] improper." *Horne*, 557 U.S. at 450 (citation omitted).

Finally, Defendants' proposed modification is suitably tailored to the changed circumstances because it recognizes that "[p]olicy changes are a slow and lengthy process, which are not well suited to frequent quarterly reporting." Docket No. 1923 at 7. Defendants' proposed modification also provides them with a means to more efficiently use their resources, while still enabling Plaintiffs to monitor their progress on an annual basis. *Rufo*, 502 U.S. at 392–93 ("[Resource] constraints may not be used to justify the creation or perpetuation of constitutional violations, but they are a legitimate concern of government defendants in institutional reform litigation and therefore are appropriately considered in tailoring a consent decree modification.").

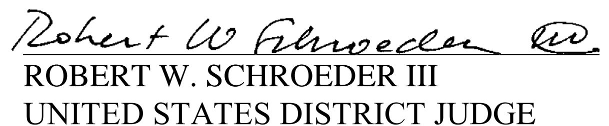
Thus, for the reasons stated above, the Court finds it is no longer equitable to continue to enforce quarterly monitoring reports as required by Paragraph 306 of the Consent Decree. Defendants' Amended Motion to Modify Consent Decree Paragraph 306 Under Federal Rule of Civil Procedure 60(b)(5) (Docket No. 1923) is, therefore, **GRANTED**. The Court, however, recognizes that the parties may be amenable to agreeing that certain aspects of the monitoring reports may be reported on a quarterly basis. Docket No. 1930-1. Accordingly, it is

ORDERED that Paragraph 306 of the Consent Decree is hereby **MODIFIED** as follows: "Defendants will make monitoring reports annually on July 31 of each year." Defendants' annual reporting shall commence on **Wednesday, July 31, 2024**. It is further

ORDERED that, after **Wednesday, July 31, 2024**, should Plaintiffs find that Defendants' annual monitoring reports are insufficient in any aspect, the parties shall meet and confer in an attempt to reach an agreement concerning certain aspects of the annual monitoring reports that can be reported quarterly. If the parties do not reach an agreement, Plaintiffs may seek leave to file a motion to reinstate quarterly reporting for certain aspects of the monitoring reports. Plaintiffs' motion for leave shall summarize the results of the parties' meet and confer and include a concise statement that explains Plaintiffs' need for quarterly reporting as opposed to annual reporting for the allegedly insufficient portions of the annual monitoring report. It is further

ORDERED that Defendants' Original Motion to Modify Consent Decree Paragraph 306 Under Federal Rule of Civil Procedure 60(b)(5) (Docket No. 1922) is **DENIED-AS-MOOT**.

So ORDERED and SIGNED this 10th day of February, 2023.



ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE