No. 15-_____

In The
Supreme Court of the United States

CARLA FREW, et al.,

Petitioners,

v.

CHRIS TRAYLOR, Commissioner of the Texas Health and Services Commission, etc., and Kay Ghahremani, State Medicaid Director of the Texas Health and Human Services Commission,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Litigation regarding the legal responsibilities of large institutions, such as schools or prisons, is frequently resolved by consent decree.* The widespread use of such consent decrees regularly gives rise to inter-related disputes about how to interpret provisions of those decrees, and about when the decrees themselves have been satisfied and may thus be dissolved. In the instant case the Fifth Circuit, expressly disagreeing with the standards applied in the Sixth and Ninth Circuits, interpreted in a narrow manner, and then ordered dissolution of, key provisions earlier agreed to by Texas that protect the rights of millions of indigent children to medical care under the Medicaid law.

The questions presented are:

(1) In interpreting the provisions of a consent decree, and in deciding whether those provisions should be dissolved, should a court consider the purpose for which the provisions were adopted?

(2) In interpreting the provisions of a consent decree, and in deciding whether those

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* The litigation in this case involved two types of agreed-upon orders, one denoted a Consent Decree, and the others denoted as Corrective Action Orders. In the Questions Presented we use the phrase "consent decree" generically to refer to any form of agreed-upon order.

QUESTIONS PRESENTED – Continued

provisions should be dissolved, should a court give weight to the interpretation of the provisions by the judge who originally approved them?

PARTIES

The plaintiffs in this action are Carla Frew, Maria Ayala, and Nicole Carroll, Mary Jane Garza, and Charlotte Garvin as next friends of their minor children, and the class of all Texas Medicaid recipients under the age of 21 who are eligible for EPSDT services but are not receiving the services to which they are entitled.

The defendants are Chris Traylor, M.D.,* Commissioner of the Texas Health and Human Services Commission, and Kay Ghahremani, State Medicaid Director of the Texas Health and Human Services Commission, who are sued in their official capacities.

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* Chris Traylor is substituted as a defendant in place of Kyle Janek pursuant to Rule 25(d), Federal Rules of Civil Procedure.

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Petitioners Carla Frew, et al., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on March 5, 2015.

OPINIONS BELOW

The March 5, 2015, opinion of the court of appeals, which is reported at 780 F.3d 320 (5th Cir. 2015), is set out at pp. 1a-23a of the Appendix. The July 14, 2015, order of the court of appeals denying rehearing en banc, which is not officially reported, is set out at pp. 47a-48a of the Appendix. The December 18, 2013, opinion of the district court, which is reported at 5 F.Supp.3d 845 (E.D.Tex. 2013), is set out at pp. 24a-46a of the Appendix.[1]

JURISDICTION

The decision of the court of appeals denying rehearing en banc was entered on July 14, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] Earlier phases of this litigation are summarized *infra*, pp. 5-8.

STATUTORY PROVISION AND RULE INVOLVED

Section 1396r-8(d)(5), 42 U.S.C., provides:

> A State plan under this subchapter may require, as a condition of coverage or payment for a covered outpatient drug for which Federal financial participation is available in accordance with this section, ... the approval of the drug before its dispensing for any medially accepted indication ... only if the system providing for such approval –
>
> > (A) provides response by telephone or other telecommunication device within 24 hours of a request for prior authorization; and
> >
> > (B) ... provides for the dispensing of at least 72-hour supply of a covered outpatient prescription drug in an emergency situation (as defined by the Secretary).

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed

> or vacated; or applying it prospectively is no longer equitable....

STATEMENT

This is an action brought under the Medicaid Act to protect the rights of Texas children entitled to medical benefits under that federal law. The class of plaintiffs includes more than 3.5 million indigent Texas children.[2] In 1996 Texas officials agreed to a Consent Decree designed to address massive and complex violations of the Act. Two years later, in the face of pervasive violations of the Decree, the plaintiffs moved to enforce the decree. Despite district court decisions in 2000 and 2005 finding repeated violations of the Decree, the state repeatedly appealed, refusing to agree to further compliance measures until 2007. Finally in that year the parties agreed on, and the court approved, a series of Corrective Action Orders (CAOs) to address the proven violations of the Consent Decree.

In the current litigation, the plaintiffs contend the state is in violation of certain portions of the

[2] See *Frew v. Hawkins*, 2007 WL 2667985 at *8 (E.D.Tex. Sept. 5, 2007) (2.8 million Texas children in Medicaid in 2007); Record on Appeal ("RAO") 14-40048.59164. According to information submitted by Texas for the year 2014 there were 3.7 million children in the state eligible for the Medicaid services at issue in this case. http://www.medicaid.gov/medicaid-chip-program-information/by-topics/benefits/downloads/fy-2014-epsdt-data.zip.

Consent Decree and one of the CAOs, and seeks further relief. Conversely, the state seeks dismissal of those same provisions, contending that it has fully complied with them. The relevant facts are largely undisputed; the outcome turns on the interrelated questions of how to interpret, and when to dissolve as satisfied, the provisions of a consent decree or other agreed-upon order.

In rejecting plaintiffs' interpretation of the relevant provisions of the Consent Decree and CAO, and instead dissolving those provisions, the Fifth Circuit expressly disagreed with the legal standards applied in the Sixth and Ninth Circuits.

The circumstances in which these legal questions arise are complex, as is true of many problems arising under the Medicaid law. But once that context is understood, the ultimate legal questions are straightforward, and are broadly applicable to disputes about consent decrees generally.

Legal Background

Medicaid is a cooperative federal-state program that provides federal funding for state medical services to the poor. State participation is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements. One requirement is that every participating State must have an Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. See 42 U.S.C. §§ 1396a(a)(43), 1396d(r). "EPSDT programs

provide health care service to children to reduce lifelong vulnerability to illness or disease." *Frew v. Hawkins*, 540 U.S. 431, 433-34 (2004). EPSDT is "intended to be the nation's largest preventative health program for children" and "is among the most important programs that the Texas Department of Health runs." *Frew v. Hawkins*, 401 F.Supp.2d 619, 623 (E.D.Tex. 2005). In exchange for federal Medicaid Funds, the State of Texas obligated itself to provide healthcare to eligible children under EPSDT. There are millions of children in Texas poor enough to be eligible for EPSDT who depend on it for health care.

Early Stages of the Litigation

The case was initiated in 1993, alleging that in the administration of the Medicaid program Texas had systematically violated numerous provisions of the federal law. The plaintiffs sued on behalf of a class of all Texas children eligible for Medicaid.

The litigation led in 1996 to a consent decree that dealt with many of those problems. The Consent Decree guarantees class members all of the medical services required by the Medicaid law. Paragraph 3 of the Consent Decree provides that "[r]ecipients are ... entitled to all needed follow up health care services that are permitted by federal Medicaid law." App. 57a. Similarly, paragraph 190 provides that "EPSDT recipients served by managed care organizations are entitled to timely receipt of the full range of EPSDT

services...." App. 59a. The Decree mandates a substantial number of changes and procedures for the EPSDT program "[t]o address the parties' concerns, to enhance recipients' access to health care, and to foster the improved use of health care services by Texas EPSDT recipients...." App. 57a (Paragraph 6). Texas administers the Medicaid law in part by contracting with a number of private individuals and entities, including the pharmacies that provide medicines required by the law. Paragraph 300 provides that the "[d]efendants may contract with individuals and entities to provide EPSDT services. But, Defendants remain ultimately responsible for the administration of the EPSDT program in Texas and compliance with federal EPSDT law." App. 59a.

In 1998 plaintiffs commenced proceedings to enforce the Consent Decree, asserting that the state defendants were in violation of many of its requirements. In 2000 the District Court made lengthy findings detailing systemic violations of the decree by the state defendants.[3] *Frew v. Gilbert*, 109 F.Supp.2d 579 585-660 (E.D.Tex. 2000). Defendants appealed, arguing that enforcement of the Decree was barred by the state's sovereign immunity. This Court rejected

[3] See 109 F.Supp.2d at 653 ("Defendants show their unilateral disregard for [the] Consent Decree by seeking to be excused from compliance by blaming their contractors."), 684 (defendants "have not made reasonable efforts to comply with [the Consent Decree]").

that contention. *Frew v. Hawkins*, 540 U.S. 431, 435-36 (2004).

On remand in 2005, the District Court again found the defendants in violation of the Consent Decree. *Frew v. Hawkins*, 401 F.Supp.2d 619 (E.D. Tex. 2005).[4] The defendants again appealed that finding, in this instance arguing unsuccessfully that a change in circumstances warranted termination of the decree. *Frazar v. Hawkins*, 376 F.3d 444 (5th Cir. 2006), cert. denied, 127 S.Ct. 1039 (2007).

On remand in 2007, the state relented and agreed to obey the Consent Decree and to take steps intended to correct the violations identified by the district court in 2000 and 2005. The parties resolved the compliance disputes by entry of a number of Corrective Action Orders ("CAOs"), compliance with which, it was hoped, would result in compliance with the Consent Decree itself, which remained in effect.[5] *Frew v. Hawkins*, 2007 WL 2667985 at *24 (E.D.Tex. Sept. 5, 2007). In approving those CAOs, the court noted that it had "twice found Defendants in violation

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[4] See 401 F.Supp.2d at 684 ("the Court finds that Defendants have not made reasonable efforts to comply with the judgment.... Defendants have failed, and continue to fail, even to attempt compliance with certain provisions"), 685 ("Defendants have violated, and continue to violate, multiple consent Decree provisions, ... and the court finds that they have not exerted reasonable efforts to comply with all, or substantially all, of the judgment.").

[5] ROA 14-40048.18308 (2007 Fairness Order) and ROA 14-40048.15875-15946 (Corrective Action Order).

of the Decree.... [O]n March 30, 2007, Defendants' lead trial counsel informed the Court that Defendants accepted that they had lost." *Frew v. Hawkins*, 2007 WL 2667985 at *5 (E.D.Tex. Sept. 5, 2007).

The Prescription CAO

The current litigation concerns the CAO related to prescription drugs ("the Prescription CAO") and the related provisions of the Consent Decree. See App. 46a-55a (CAO 637-8; "Corrective Action Order: Prescription and Non-Prescription Medications; Medical Equipment and Supplies") and App. 56a-60a (Consent Decree). The Prescription CAO concerns the pharmacies that provide children in the ESPDT program with the medication and medical supplies required by the Medicaid law. Although Texas contracts with those pharmacies to meet the state's legal responsibilities under Medicaid, paragraph 300 of the Consent Decree specifies that the state itself remains responsible for compliance.

The particular focus of this new round of litigation is the federally mandated 72-hour emergency drug prescriptions.

The Medicaid law requires that children in the EPSDT program be provided with medically necessary medications. The law permits a participating state to have a Preferred Drug List ("PDL"). States typically put particular drugs on their PDL because the manufacturers have agreed to give the state a rebate whenever those particular drugs are purchased

through Medicaid. A child can only receive a non-PDL drug if his or her physician (or other medical provider) obtains prior authorization; in the past that prior authorization would have come from state EPSDT officials, while today it would come from one of the health maintenance organizations that administer EPSDT in Texas. If a parent or child seeks to fill a prescription for a non-PDL drug without prior authorization, the state computer system – on which pharmacists check each proposed prescription – will reject that prescription.

Plaintiffs offered evidence that prescriptions for non-PDL drugs are rejected in hundreds of thousands of cases a year.[6] The problem arises for a number of reasons. This appears to be particularly common for emergency room doctors, who may not have the time to check whether the prescription they prefer is on the PDL list, or to call and obtain prior authorization. The state has established an electronic system which indicates which drugs are on the PDA list; the record suggests, however, that this system may not indicate that only a particular dosage (e.g. 10 mg., but not 5 mg.) or a particular form of the drug (e.g., tablet, rather than liquid) is on the PDL list.[7] The list of drugs (or dosage or form) that are on the PDL changes several times a year, and the distinction is

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[6] Plaintiffs' Response to Defendants' Rule 60(b)(5) Motion (Doc. 1004) 15 n.14 (93,126 prescriptions rejected in a single quarter for lack of prior authorization).

[7] Brief of Plaintiffs-Appellants, 27, 28, 30.

not predictable; sometimes the PDL list includes only a brand name drug, but not its generic equivalent.

In framing the Medicaid law, Congress anticipated that this problem would arise. Accordingly, federal law provides that a state may not require preauthorization of any prescription unless the state expressly provides an emergency 72-hour supply of the non-authorized medicine. 42 U.S.C. § 1396r-8(d)(5)(B). "Under the PDL system, class members may receive non-preferred drugs that are prescribed, but only with Defendants' prior approval. However, if prior authorization is delayed, federal law requires Defendants to provide a 72-hour emergency allotment of non-preferred drugs so that class members are not deprived of needed medicines. When pharmacies fail to follow this rule, class members go without emergency medications." *Frew v. Hawkins*, 2007 WL 2667985 at *24 (Sept. 5, 2007). "The purpose of the 72-hour 'emergency' prescription is to ensure that class members are not deprived of medicine that they need while prior authorization is requested, particularly (but not only) on weekends. Further, the 'emergency' allotment provides time for a new prescription to be requested if the off-PDL medicine is not approved." CAO 637-8, App. 50a. The legal right of EPSDT participants to this emergency 72-hour medication is not in dispute; Texas policy expressly includes the same requirement as section 1396r-8(d)(5)(B). App. 50a.

In 2005 the plaintiffs contended that pharmacies participating in the EPSDT program regularly failed

to provide the 72-hour emergency medication required by federal law, in substantial part because the dispensing pharmacists did not know that federal law required them to do so. Texas was obligated to prevent such violations, because the pharmacies are state contractors for whose actions the state is legally responsible. App. 59a. The Prescription CAO, agreed to by the parties and ordered by the district court, contains several provisions to deal with this problem.

First, in the paragraph referred to as "Bullet 6,"[8] the CAO provides that "Defendants, will provide intensive, targeted educational efforts to those pharmacies for which the data suggest a lack of knowledge of the 72-hour emergency prescriptions policy." App. 53a. That provision was similar to broader language of paragraph 129 of the original Consent Decree, which required the state to "implement an initiative to *effectively* inform pharmacists about EPSDT, and in particular about EPSDT's coverage of items found in pharmacies." App. 58a (emphasis added).

Second, Bullet 10 of the CAO requires that "[b]y January 2008, Defendants will train staff at their ombudsman's office about the emergency prescription standards, [and] what steps to take to immediately address class members' problems when pharmacies

[8] The CAO has a series of paragraphs preceded by bullets. Although these paragraphs are not numbered, in the lower courts the courts and the parties assigned them numbers for ease of reference. In the Appendix we have indicated those numbers in brackets.

do not provide emergency medicines....” App. 54a. The Ombudsman’s Office is the Texas agency which EPSDT participants can call if they are unable to obtain needed medicine or services.

Third, Bullet 12 provides that

> [w]hen the two analyses [of pharmacy practices required by Bullet 5] are complete, counsel will confer to determine what, if any, further action is required. Counsel will begin to confer no later than 30 days following completion of the second analysis (‘completion’). If the parties agree, they will so report to the Court within 120 days of completion. If the parties cannot agree within 90 days of completion, the dispute will be resolved by the Court upon motion to be filed by either party. If the parties cannot agree, either party will file their motion within 30 days of the conclusion of discussions among counsel.

App. 54a-55a.

The Current Litigation

(1) In 2012 plaintiffs moved to enforce the Prescription CAO, contending that the defendants were in violation of that CAO and of the related provisions of the Consent Decree. Plaintiffs filed their motion under Bullet 12 of the Prescription CAO, contending that despite the steps the state had taken that further action was required. With regard to the requirements of the CAO and Decree that the defendants educate pharmacists about the 72-hour

emergency prescription requirement, plaintiffs contended that the limited steps Texas officials had taken left large numbers of pharmacists unaware of that requirement of federal law, and thus resulted in continued widespread violations of section 1396r-8(d)(5)(B). See pp. 31-33, *infra*. With regard to the CAO requirement that the state train Ombudsman officials to "immediately" address the problems of class members denied non-PDL medicines, plaintiffs contended that the training failed to comply with the CAO because those officials were not instructed to respond to that problem by informing the pharmacy which had rejected a non-PDL prescription that it was required to immediately provide a 72-hour supply of the medicine in question. See pp. 33-34, *infra*. Plaintiffs offered evidence, including statements from a former President of the Texas Pediatric Association, that the failure of pharmacies to provide children with the federally required 72-hour supply of medication had caused suffering to and endangered individual patients.[9]

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[9] The detailed accounts and other documents were filed under seal, in order to avoid questions about the privacy requirements of the Health Insurance Portability and Accountability Act. Declaration of Dr. Stephen Whitney (immediate past president of the Texas Pediatrics Association); Declaration of Dr. Jane Rider (chair from 2007 to 2012 of the Texas *Frew* advisory committee established by Texas Medicaid Officials); Declaration of Dr. Pamela Wood (Clinical Professor Pediatrics at the School of Medicine at the University of Texas Health Science Center in San Antonio).

The defendants responded by moving to dissolve both the Prescription CAO and the related Decree provisions, claiming that the steps they had taken satisfied the requirements of both.

The litigation in the courts below turned on the legal standard governing the interpretation of the requirements of a consent decree (including the CAO), and on the related legal standard governing when a decree can be dissolved under Rule 60(b) on the ground that the defendant has fully complied with its requirements.

The state noted in the court below, that "[t]here are no factual disputes regarding the State's actions to implement this provision of the corrective-action order." Appellees' Brief, 31. Plaintiffs offered evidence that a large number of pharmacies and pharmacists in Texas are unaware of the 72-hour supply requirement in section 1396r-8(d)(5)(B), and that violations of that federal law are widespread. See pp. 31-32, *infra*. It is unclear to what extent the state disagrees with those contentions. However, under the legal standards advanced by the state and applied by the courts below those contentions were deemed legally irrelevant; for the purpose of this appeal, they are assumed to be correct.

The resolution of both motions turned largely on disputes about the meaning of several provisions of the Prescription CAO and the Consent Decree: (1) What constitute "intensive, targeted education efforts" under Bullet 6 of the CAO? (2) What are initiatives

that "effectively inform pharmacists" under paragraph 129 of the Consent Decree? (3) What constitute "steps to take to immediately address class members' problems" under Bullet 10 of the CAO? (4) What standard governs the authority of the court to resolve a dispute regarding whether there is a need for "further action" under Bullet 12 of the CAO?

The central legal issue about which the parties disagreed, and which was of controlling importance in the court below, is whether in interpreting a consent decree (or other agreed upon order), and in deciding whether to dismiss a decree or provision, a court should consider the purpose of the provision at issue.[10] Expressly rejecting the contrary view of the Ninth Circuit (and others), the Fifth Circuit insisted that that purpose is legally irrelevant to a judicial decision to interpret, or dissolve, a consent decree.

(2) The district court denied the plaintiffs' motion to enforce the Prescription CAO, and granted the state's motion to dissolve the CAO and paragraphs 124-30 of the Consent Decree. The district court decision rested in significant part on reasoning which neither the state nor the court of appeals defended. The district court held that it could not inquire or determine whether the state had "effectively" educated pharmacists because the state had never

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[10] Brief of Plaintiffs-Appellants, 10, 42-44, 48-52, 56-57, 61; Appellees' Brief, 14-15, 18-28; Reply Brief of Plaintiffs-Appellants, 8, 11, 17, 22.

agreed to any effectiveness requirement. App. 37a-38a. However, paragraph 129 of the Consent Decree expressly uses the term "effectively." The district court believed that under federal law and the CAO providing an emergency 72-hour supply of medication is optional. App. 34a ("allowed to dispense"), 34a ("can dispense"), 40a ("encouraged to dispense"). To the contrary, providing that 72-hour emergency medication is required by federal law. App. 7a. The district court applied a subjective standard in construing Bullet 10, holding that the issue was whether the state had taken steps with the intent of assuring immediate compliance with section 1396r-8(d)(5)(B), rather than whether the steps taken actually did or were likely to assure immediate compliance. App. 36a ("designed and intended").

(3) The court of appeals repeatedly recognized the specific purposes of the Decree and CAOs, which in several instances are spelled out in their text.[11]

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[11] App. 4a ("the parties agreed on eleven corrective action orders, each aimed at bringing Defendants into compliance with a specific portion of the Decree. CAO 637-8 ... implemented ¶¶ 14-30 of the Decree, which concerned deficiencies in Medicaid-participating pharmacies understanding of the EPSDT."), 6a (" ¶ 6 [of the Consent Decree] ... describes the purpose of the Decree as '[t]o address the parties' concerns, to enhance recipients' access to health care, and to foster the improved use of health care services by Texas EPSDT recipients.' "), 7a ("To remedy the pharmacists' misunderstanding [that providing the 72-hour emergency supply is optional, or unreimbursed], CAO 637-8 established a series of detailed action items, elaborating on and expanding the requirements found in ¶¶ 124-30 of the

(Continued on following page)

The Fifth Circuit, however, emphatically refused to consider the purposes of the CAO and paragraph 129 of the Consent Decree in determining the manner in which those provisions should be interpreted.[12]

Interpreting a consent decree (or other agreed-upon provision) in light of its purpose, the Fifth Circuit reasoned, would be dealing with the issue backwards. Every consent decree provision, the court insisted, embodies an unstated agreement between the parties that the provision (however it might subsequently be interpreted) fully achieves the purposes of the decree, including (as in the instant case) purposes spelled out in the very text of the decree. The Prescription CAO, the Fifth Circuit held, was by its very nature "a clearly defined roadmap for attempting to achieve the Decree's purpose. In other words, the parties *already agreed* that substantial compliance with this roadmap would achieve their common goal." App. 16a (Emphasis in original; footnote omitted). "[T]he district court did not err in interpreting [the Prescription] CAO ... and ¶¶ 124-30 [of the Consent Decree] to mandate specific actions only, the performance of which would automatically

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Decree."), 15a ("The introductory paragraphs [of the Consent Decree] ... show that the Decree is aimed at supporting EPSDT recipients in obtaining the health care services they are entitled to, by addressing concerns, enhancing access, and fostering use of services." (emphasis omitted)).

[12] See App. 14a (sufficient that the defendants "perform the required action items mechanically").

satisfy the parties' intent in concluding these agreements." App. 19a. "[T]he parties never agreed" that whether an action by the state satisfied paragraph 129 or the CAO would involve an "assessment" of whether interpreting those provisions in that manner would meet, or defeat, their purpose. App. 16a.

Consideration of whether an interpretation of a decree was consistent with its purpose would also be inherently impractical, the Fifth Circuit insisted, because it would never be clear how much was necessary to satisfy that purpose. "The Decree ... sets no results-based milestones; neither do ¶¶ 124-30 establish any objective standard that pharmacists must achieve before Defendants' educational efforts may be considered successful. Plaintiffs have not pointed to any discrete endpoint for [the Prescription] CAO ... or these Decree paragraphs." App. 16a The purpose of a provision could be considered only if a decree provided "an objective standard" for determining when the purpose had been achieved. App. 19a.

Although Bullet 12 of the CAO expressly authorized the court to "resolve" a dispute about whether "further action is required," the Fifth Circuit insisted that in resolving a motion for further relief under Bullet 12 (the procedural posture of this case) a court could not consider the purpose of the CAO, because Bullet 12 (which does not list *any* standard for resolving such a dispute) does not specifically list the purpose of the CAO or the Consent Decree as a permissible consideration. "CAO 637-8[ ] instruct[s] ... 'counsel ... [to] confer to determine what, if any,

further action is required' after Defendants complete the second study of pharmacists' claims history. If the parties cannot agree, then the court may step in. There is nothing, however, instructing the court to resolve the dispute with reference to the Decree's overall purpose." App. 19a n.40.

The Fifth Circuit acknowledged that in *Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011), the Ninth Circuit had held that before dissolving a consent decree – the action the Fifth Circuit was directing – a court must consider whether the defendant's steps have achieved the purpose of the decree. But the court of appeals below expressly disagreed with the Ninth Circuit's holding, dismissing the Ninth Circuit's analysis in *Jeff D.* as not "persuasive[ ]." App. 18a.[13] "The Ninth Circuit's reasoning rested on two school desegregation cases, which present unique issues in consent decree jurisprudence, and on a case that appears to have considered the flexible standard for modifying consent decrees, a standard associated with the third clause of Rule 60(b)(5)." App. 18a. The Fifth Circuit also sought to distinguish *Jeff D.* by pointing to a provision in the decree in that case regarding whether the plaintiffs' claims had been satisfied, but conceded that the Ninth Circuit's holding had not itself relied on that provision. App. 19a.

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[13] Appellees' Brief, 22 ("*Jeff D.* was wrong to impose this ... requirement, and it made no effort to reconcile its holding with ... Supreme Court[ ] [precedent]."), 23 n.5 ("*Jeff D.* was wrong to impose this additional requirement on States ... and its analysis is irreconcilable with [controlling Supreme Court precedent].").

The Fifth Circuit also rejected Sixth Circuit decisions holding that in construing a consent decree deference should be accorded to the interpretation of that consent decree by the judge who originally approved that decree. "Plaintiffs urge that [the manner] in which Judge Justice construed various provisions of the Decree, is entitled to deference.... They appear to find this rule in a line of Sixth Circuit cases that apply 'deferential de novo' review to interpretations of consent decrees by the judges who initially approved them. We have never followed this rule." App. 10a.[14] The Fifth Circuit's interpretation of the Consent Decree and the CAO were materially inconsistent with the interpretation of those orders by Judge Justice, who had presided over this case between 1993 and 2009. See pp. 33-34, *infra*.

Having concluded that the disputed portions of the Decree and CAO should be interpreted without regard to the purpose for which they were adopted, the Fifth Circuit applied those provisions in a purposeless manner. The Consent Decree requirement that pharmacies be informed "effectively," and the CAO requirement of "intensive ... educational efforts," it held, were both satisfied simply by disclosing in a single sentence in a single flyer the existence of the requirement of a 72-hour emergency supply of medication. App. 22a. It was irrelevant whether that

[14] See Appellees' Brief, 27 n.6 ("the Sixth Circuit [decision] in *Shy* [*v. Navistar Intern. Corp.*, 701 F.3d 523 (6th Cir. 2012)] ... should not be followed.").

disclosure had actually educated the pharmacists, or was likely to do so. The CAO requirement that Ombudsman office staff be trained about the steps to take to "immediately address" the denial of a non-PDL prescription was satisfied, it held, as long as there was training. App. 22a-23a. The court of appeals saw no reason to consider or resolve plaintiffs' contention that the *content* of the training in question directed the staff to do something that would not address that problem immediately, or perhaps at all. That would have impermissibly involved consideration of the purpose of the CAO requirement: actually helping parents get medicine for their sick or injured children.[15]

Plaintiffs filed a petition for rehearing en banc, emphasizing that the panel had expressly disagreed with precedents in the Ninth and Sixth Circuits. On July 14, 2015, rehearing was denied. App. 47a-48a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit decision in this case rests on a clear and emphatic rejection of contrary precedents in the Ninth and Sixth Circuits. Other circuits generally agree that the purpose of a consent decree should be considered in interpreting that decree, and in deciding the related question of whether a decree should be dissolved because the defendant has complied with

[15] See pp. 32a-33a, *infra*.

it. But in the instant case the court of appeals held that it would be improper and unworkable for a court to attempt to consider the purpose of a decree in deciding how to interpret or whether a defendant had satisfied the decree. There is a well recognized 5-2 circuit split about whether appellate courts should accord deference to a district judge's interpretation of a consent decree which that district judge had approved.

At an earlier phase of this litigation, this Court held that a decree should be dissolved "when the objects of the decree have been attained." *Frew v. Hawkins*, 540 U.S. 431, 442 (2004). Here the Fifth Circuit has dissolved provisions of the very Consent Decree at issue in *Frew v. Hawkins*, while insisting – as the state itself argued below – that courts asked to dissolve a consent decree have no business considering whether the objects of that decree have been attained.

The precedential Fifth Circuit decision in this case threatens a profound disruption of the use of consent decrees to resolve civil litigation. If existing decrees are now to be construed without regard to their purpose, the settlements previously embodied in those decrees may now prove meaningless; a defendant may be able to effectively get out of its bargain by engaging in pro forma actions that accomplish virtually nothing. The immediate effect of the Fifth Circuit decision has been to trigger the systematic dismantling of other orders in this case without regard to whether Texas officials had taken actions that satisfied

the purposes of those orders. Prospectively, the Fifth Circuit decision in this case demands that future consent decrees regulate a defendant's conduct in excruciating detail, and impose exacting and highly specific standards of success, if those decrees are to be enforceable. By holding that courts may disregard the interpretation of a consent decree by the very judge who earlier approved it, the Fifth Circuit invites litigants to reopen all consent decree litigation whenever a case is assigned to a new judge.

This case presents an ideal vehicle for addressing, and correcting, the misguided precedents established by the Fifth Circuit.

I. THE FIFTH CIRCUIT DECISION CONFLICTS WITH DECISIONS IN NUMEROUS COURTS OF APPEALS

(1) The panel opinion rested on its insistence that in construing a consent decree (or other agreed-upon order), and in deciding the related issue of whether a decree should be dissolved because the defendant has complied with a decree, courts are not to consider the purpose of the decree. The Fifth Circuit acknowledged that its decision conflicted with the Ninth Circuit decision in *Jeff D.* Numerous other circuits have also held that courts should consider the purpose of a consent decree.

In *Jeff D.* the Ninth Circuit correctly insisted that a decree could not be dissolved without consideration of whether its purposes had been achieved.

> [Compliance with the specific terms of a decree] while clearly relevant, [is] not the only matter[ ] to be considered in determining whether the consent decrees have served their purpose. The status of compliance in light of the governing standards require[s] overall attention to whether the larger purpose of the decrees have been served. Indeed, this requirement is inherent in the very nature of 'substantial compliance.' ... It may be that compliance with [specific decree provisions] was all that was required for ... the overall purposes of the decrees ... , but that finding or conclusion has not been made [by the district court in this case]. Before the consent decrees may be vacated, there must be careful attention to their purposes.... If the purposes of the consent decrees ... have not been adequately served, the decrees may not be vacated.... Explicit consideration of the goals of the decrees and ... whether those goals have been adequately served, must be part of the determination to vacate the consent decrees.

643 F.3d at 288-89. Similarly, in *Youngblood v. Dalzell*, 925 F.2d 954, 961 (6th Cir. 1991), the Sixth Circuit held that "[b]efore the district court dissolves the decree, it must determine that the goals of the consent decree have been achieved...." The Sixth Circuit took the same position in *Gonzalez v. Galvin*, 151 F.3d 526, 531 (6th Cir. 1998):

> A district court must look to the specific terms of a consent decree in determining

> whether ... to terminate ... jurisdiction over it.... Factors to be considered include ... the consent decree's underlying goals.... [A] district court may not terminate its jurisdiction until it finds both that Defendants are in compliance with the decree's terms and that the decree's objective have been achieved.

In *United States v. Louisville and Jefferson County Metropolitan Sewer District*, 983 F.2d 1070 (7th Cir. 1993), the Seventh Circuit agreed that a "consent decree should terminate when the purpose of the decree has been fulfilled." The Eleventh Circuit also insists on consideration of the purpose of a consent decree. "A court faced with a motion to terminate ... a consent decree must begin by determining the basic purpose of the decree.... [A] decree may not be changed 'if the purposes of the litigation as incorporated in the decree ... have not been fully achieved.'" *United States v. City of Miami*, 2 F.3d 1497, 1505 (11th Cir. 1993) (quoting *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247 (1991)).

Decisions in numerous circuits also hold – unlike the Fifth Circuit in the instant case – that the purpose of a consent decree is an important factor in interpreting its provisions. In *Pigford v. Vilsack*, 777 F.3d 509, 515 (D.C.Cir. 2015), the District of Columbia Circuit held that it would be improper to construe the provisions of a consent decree in a manner that "would frustrate the purpose" of those provisions. "The District Court was clearly justified in looking to

the ... provision's aims to ensure that its interpretation of the ... text corresponded to the parties' understanding of their bargain." In interpreting the section in question, "the District Court reasonably looked to the parties' purpose." *Id.* In *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 798 (10th Cir. 1979), the Seventh Circuit held that "[t]he district court's interpretation of the ... provision of this consent decree was reasonable in light of the language and purpose of the decree." (Footnote omitted). The Second Circuit applies the same rule. "When the language of a decree is ambiguous, ... a court may consider ... extrinsic evidence to determine the parties' intent, including the purpose of the provision.... " *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 43 (2d Cir. 2012).

(2) The panel decision was also emphatic in holding that an appellate court should interpret a consent decree or order without giving any weight to the interpretation of that decree or order adopted by the trial judge who had approved the decree or order. App. 10a-11a. The Fifth Circuit candidly acknowledged that its holding was inconsistent with the rule in the Sixth Circuit. App. 11a.

The Sixth Circuit has repeatedly approved the very deference rule rejected by the panel in this case. "[T]he district judge's interpretation of a consent decree deserve[s] deference where that judge oversaw and approved the consent decree." *Shy v. Navistar Intern. Corp*., 701 F.3d 523, 528 (6th Cir. 2012). "[W]e give some deference to a district court's interpretation of a consent decree where that court was involved in

creating the decree." *G.G. Marck and Associates, Inc. v. Peng*, 309 Fed.Appx. 928, 935 (6th Cir. 2008). "Few persons are in a better position to understand the meaning of a consent decree than the judge who oversaw and approved it." *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981). "Where ... we are reviewing the interpretation of a consent judgment by the district court that crafted the consent judgment, ... [i]t is only sensible to give the court that wrote the consent judgment greater deference when it is parsing its own work." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 371 (6th Cir. 1998).

The circuit conflict on this issue is deeply entrenched and well recognized. The First, Second, Seventh and Ninth Circuits agree with the Sixth Circuit that deference should be given to the interpretation of a consent decree by the judge who originally approved that decree. *Langton v. Johnston*, 928 F.3d 1206, 1221 (1st Cir. 1991) (opinion joined by Breyer, J.); *County of Suffolk v. Alcorn*, 266 F.3d 131, 137 (2d Cir. 2001) (applying clear error standard to judge's interpretation of ambiguous language in decree he or she approved); *Foufas v. Dru*, 319 F.3d 284, 286 (7th Cir. 2003) (citing cases); *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*, 934 F.3d 1092, 1094 (9th Cir. 1991). The United States has endorsed that view.[16] On the other hand, the Third Circuit has emphatically rejected any

[16] 2000 WL 340005403 at *23-*24.

such deference. *Holland v. New Jersey Dept. of Corrections*, 246 F.3d 267, 277 (3d Cir. 2001). The Third Circuit has been unsparing in its criticism of the majority rule:

> Numerous ... cases [in other circuits] take this seemingly contradictory "plenary, but deferential" approach to the review of a district court's interpretation or construction of a consent decree.... This Court, in contrast, has held many times that a district court's construction and interpretation of a consent decree is subject to straightforward plenary or de novo review.... We ... think that the Third Circuit position is the more reasonable one, because the concept of "deferential de novo"... review seems to be an oxymoron.... The courts that apply "deferential de novo" do not explain how they amalgamate these two seemingly incompatible standards. We decline to follow these other courts and instead adhere to the long tradition in this Circuit of reviewing a district court's interpretation of a consent decree de novo.

246 F.3d at 277-78 (footnote omitted); see *id.* at 278 n.9 (Sixth Circuit decision in *Sault Ste. Marie Tribe* is "a hodgepodge standard"). "Not all courts agree." *Foufas*, 319 F.3d at 286.

II. THE QUESTIONS PRESENTED ARE OF GREAT PRACTICAL IMPORTANCE TO THE VIABILITY OF RESOLVING LITIGATION BY CONSENT DECREE

The precedential decision of the Fifth Circuit in the instant case threatens to seriously undermine the use of consent decrees to resolve civil litigation, particularly in complex cases involving large institutions.

(1) The immediate effect of the decision below is to call into question the effectiveness and viability of existing consent decrees in the Fifth Circuit, and elsewhere. Under the reasoning of that decision, a defendant which has taken only nominal steps to comply with a consent decree may now be able to obtain dissolution of the decree, rather than face a possible finding of violation and an order of additional relief.

That is precisely what is now occurring in Texas regarding other important elements of the Consent Decree and the other Corrective Action Orders in this case.[17] On September 29, 2015, in two separate orders, the district court dissolved another 36 paragraphs of the Consent Decree in this case, as well as two Corrective Action Orders, one concerning the training of health care providers, and a second regarding compliance with Medicaid requirements for transportation of Medicaid-eligible patients. The district court,

[17] Documents 1396 and 1397.

applying the reasoning of the Fifth Circuit in the instant case, dismissed as irrelevant the plaintiffs' contentions the requirements of those provisions should be construed in light of their purposes, and that the limited steps taken by Texas officials had not achieved the purposes of those provisions or ended violations of the Medicaid law.[18]

The Fifth Circuit's decision is a road map for avoiding meaningful compliance with existing decrees, because a defendant's act of purported compliance need not be meaningful, in the sense that it need not actually resolve or even address the purposes of the consent decree provision at issue. As this case well illustrates, where a consent decree has been framed in broad language to accord an institutional defendant discretion in framing solutions, the Fifth Circuit decision invites the defendant to proffer a response that is not really a solution at all.

(2) Even more seriously, the Fifth Circuit decision threatens the viability of consent decrees for resolving future violations.

Under the reasoning of the court of appeals, the very flexibility accorded to state officials under the Consent Decree and the Prescription CAO became their fatal flaw. In the absence of highly particularized measures of success, the state was under no obligation to frame a response that actually worked.

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[18] Documents 1396 and 1397.

In the wake of this decision, plaintiffs will have to insist that any future consent decree set out for each problem it addresses a mandatory "results-based milestone[ ]" (App. 16a). In the absence of a specific and rigid "discrete end point" (App. 16a), a decree may be dissolved before it has accomplished much of anything. The provisions of a decree may prove toothless unless it "establish[es] an[ ] objective standard that [the defendant] *must* achieve." App. 19a (emphasis added). The principles of federalism are ill-served by forcing plaintiffs to demand such inflexible requirements.

The Fifth Circuit decision also incentivizes decree provisions that micromanage the actions of state officials. For example, Bullet 10 directed the state to train the Ombudsman staff about "what steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines." In the absence of a more specific directive, Texas assertedly trained the staff to respond to that problem by giving the class members advice that was highly unlikely to work, rather than by simply calling the pharmacy and telling it to obey federal law. See pp. 35-36, *infra*. In future decrees, plaintiffs would have to spell out in exacting detail the content of each training session, as well as its timing and participants. Only a decree that contains such minutiae would be protected from what occurred in this case. The decision below thus effectively forces plaintiffs to seek decrees that leave institutional defendants with an absolute minimum of flexibility.

(3) Similarly untoward consequences will follow from the Fifth Circuit's insistence that no deference should be accorded to the interpretation of a consent decree by the judge who initially approved that decree. The judge who has done so, usually after a fairness hearing and reviewing considerable documentation, is likely to understand the decree far better than a later court. As Justice O'Connor noted in *Rufo v. Inmates of the Suffolk County Jail*,

> [o]ur deference to the District Court[ ] ... is heightened where ... the District Court has effectively been overseeing a large public institution over a long period of time.... [Such a judge] develop[s] an understanding of the difficulties involved ... that an appellate court, even with the best possible briefing, could never hope to match. In reviewing [such a] District Court's judgment, we accordingly owe substantial deference to "the trial judge's years of experience with the problem at hand."

502 U.S. 367, 394 (1992) (quoting *Hutto v. Finney*, 437 U.S. 678, 688 (1978)).

Frequently, as occurred in this case, a trial judge will have spent years overseeing the implementation of a decree, issuing a series of decisions construing its provisions and providing guidance on which the parties rely. Under the Fifth Circuit's holding, unless those earlier decisions were appealed, they will have no weight if and when the case is assigned to a new judge. The parties will be free to reopen questions

that were settled only so long as the original judge was still assigned to the case. Such a situation invites instability in the law, and provides a perverse incentive for defendants to postpone compliance with a decree in the hope that in the future they can relitigate those questions before a later judge who may construe it in a more favorable manner.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

(1) This case presents a compelling example of the type of case in which it matters whether the provisions of a decree are construed in light of its underlying purposes.

The CAO and Consent Decree required the state to provide "intensive ... educational efforts" and to "effectively inform pharmacists." The purpose of those provisions was to assure that the thousands of Texas pharmacists providing services to EPSDT children actually understand, and obey, the requirements of federal law. If the quoted language was construed in light of those purposes, there is no chance it would have been interpreted in a manner that would have been satisfied by the state's meager efforts. Measured against that purpose, and in light of the history of this problem in Texas, there was virtually no chance that the limited steps taken by the state could succeed, if (as most circuits hold) success were relevant to the meaning of those provisions.

Plaintiff offered evidence that even after those steps had been taken there was (unsurprisingly) still a pervasive lack of understanding among pharmacists about what federal law required, including whether providing a 72-hour emergency supply of medicine was mandatory, rather than optional. In response to a survey in the record, pharmacists gave detailed explanations of why they were still not providing that supply, a response that was highly unlikely if they understood they were violating the Medicaid law.

Plaintiff also adduced evidence that, because of this lack of understanding of the requirement of section 1396r-8(d)(5)(A), there were still pervasive violations for that provision. The state's own records indicated that non-authorized non-PDL prescriptions, which under the Medicaid law should have been filled on the very day submitted for (at least) 72 hours, were actually filled on the day submitted only about 44% of the time, and were never filled at all in about one quarter of all cases.[19] A study commissioned by the defendants themselves showed widespread violations of the 72-hour supply requirement. Of the pharmacy and pharmacy employees surveyed, 50% had seen emergency prescriptions denied in the previous month, and 21% had seen them denied one to five times a week.[20] Another study done by the

[19] The evidence regarding the lack of understanding and compliance by pharmacists is summarized in Brief for Plaintiffs-Appellants, 16, 20-24.

[20] Briefs for Plaintiffs-Appellants, 21-22.

defendants showed that in the last quarter analyzed 2,286 Medicaid-participating pharmacies, including hundreds of the highest volume pharmacies in the state, had provided no 72-hour supplies at all during that quarter.[21] Plaintiffs contended that the record showed that more than 75% of the high-volume pharmacies were in violation of the emergency supply requirement.[22]

Similarly, Bullet 10 required the state to provide to the staff of the Ombudsman's office training about the "steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines." The purpose of that provision, of course, was to assure that the class members "immediately" received the medicine they needed. Plaintiff offered evidence, however, that the staff were not trained to call the pharmacy and tell it to obey federal law and state policy, but instead were instructed to advise callers to contact the health maintenance organization that provided their care.[23] Measured by the purpose of the provision, that training was clearly insufficient; a call to an HMO by a class member could not succeed, because an HMO will only authorize a non-PDL prescription at the request of a physician or other health care provider,

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[21] Plaintiffs' Motion to Enforce the Corrective Action Order: Prescription and Non-Prescription Medications, 21-22.

[22] *Id.* at 20. The defendants disagreed with that contention.

[23] The evidence regarding the content of this training is summarized in Brief for Plaintiffs-Appellants, 15, 25-26, 62-64.

not at a request of a patient (or his or her parent). On the other hand, the courts below – deliberately putting aside the actual purpose of Bullet 10 – thought this sufficient, because the subject matter of the training was literally (albeit pointlessly) about how the staff were to respond to class members who could not get needed medicine.

(2) The Fifth Circuit's refusal to give weight to the interpretation of the Consent Decree and Prescription by the judge who had approved them was also of controlling importance. The Fifth Circuit's interpretations of those orders is in several important respects contrary to the understanding of the judge who had issued them.

The Fifth Circuit held that the requirement that Texas officials "effectively" educate pharmacists required only a letter that included a flyer mentioning the requirement of the 72-hour emergency supply, regardless of whether that letter had any effect on what the pharmacists understood or did, or even whether the pharmacy that received the letter bothered to read it or mention the letter to its employees. App. 22a. The trial judge, on the other hand, understood "effective" education to encompass at least a resulting understanding, and perhaps also resulting action in conformity with that understanding. *Frew v. Gilbert*, 109 F.Supp.2d 579, 596-99 (E.D.Tex. 2000). The Fifth Circuit insisted that by agreeing to the Prescription CAO, the plaintiffs had agreed that compliance with the CAO and related Consent Decree provisions (however they might later be construed)

would in fact assure that class members receive the medical care and medication required by the Medicaid law and the Decree itself. App. 16a, 19a. The trial judge did not think the plaintiffs had agreed that was certain to occur, but merely expressed the hope, for example, that the CAO "should improve class members' access to medicines prescribed for them." *Frew v. Hawkins*, 2007 WL 2667985 at *24 (E.D.Tex. Sept. 5, 2007). The trial judge did not think that the plaintiffs were agreeing to accept whatever occurred pursuant to the CAO in place of their rights under the Consent Decree. *Id.* at 2007 WL 2667985 *30 n.1.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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United States Court of Appeals,
Fifth Circuit.

Carla FREW; Charlotte Garvin, as next friend of her minor children Johnny Martinez, Brooklyn Garvin and BreAnna Garvin; Class Members; Nicole Carroll, Class Representative, Plaintiffs-Appellants

v.

Kyle JANEK, Commissioner of the Texas Health and Human Services Commission in his official capacity; Kay Ghahremani, State Medicaid Director of the Texas Health and Human Services Commission in her official capacity, Defendants-Appellees.

No. 14-40048. | March 5, 2015.

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Appeal from the United States District Court for the Eastern District of Texas.

Before JOLLY, WIENER, and CLEMENT, Circuit Judges.

Opinion

WIENER, Circuit Judge:

This appeal arises from the district court's termination of several provisions of a consent decree and the dissolution of a related corrective action order pursuant to the first clause of Federal Rule of Civil Procedure 60(b)(5) – that the judgment has been "satisfied, released, or discharged." Plaintiffs represent a class of Texas children eligible for Medicaid's Early and Periodic Screening, Diagnosis, and Treatment program ("EPSDT" or "the Program"). They concluded a consent decree (the "Decree") with various Texas state officials ("Defendants") in 1996 to make improvements to Texas's implementation of the Program. In 2007, the parties agreed on a corrective action order to resolve Plaintiffs' concerns with one part of the Decree. Defendants, believing their obligations to be satisfied, have now moved to dissolve that order and the associated Decree provisions under Rule 60(b)(5). The district court granted their motion. We affirm.

I. Facts and Proceedings

A. Past Proceedings

This action began in 1993 when Plaintiffs, representatives of a class of over 1.5 million Texas children

eligible for EPSDT, sued Defendants under 42 U.S.C. § 1983 for violations of federal Medicaid law in the state's implementation of the Program.[1] As noted, the parties concluded a consent decree in 1996 in which Defendants promised to implement a number of changes, among which was a training program for participating health care providers.[2] A few years later, after little progress had been made, the district court found Defendants in violation of the Decree ("*Frew I*").[3] We reversed, solely on Defendants' challenge to the Decree's validity under the Eleventh Amendment ("*Frew II*").[4] The Supreme Court then reversed *Frew II* ("*Frew III*").

In *Frew III*, the Court noted that Defendants' legitimate concerns over the Decree's potential to "undermine the sovereign interests and accountability of state governments" were not properly addressed to the Eleventh Amendment but to the district court's power, under Rule 60(b)(5), to grant relief "if 'it is no longer equitable that the judgment should have prospective application.'"[5] The Court reiterated the "flexible standard" for modification of institutional-reform

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[1] *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 434, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004); *Frew v. Gilbert*, 109 F.Supp.2d 579, 587 (E.D.Tex.2000).

[2] *See Frew*, 109 F.Supp.2d at 588.

[3] *See id.* at 678.

[4] *See Frazar v. Gilbert*, 300 F.3d 530, 543 (5th Cir.2002).

[5] *Frew*, 540 U.S. at 441, 124 S.Ct. 899 (quoting FED.R.CIV.P. 60(b)(5)).

consent decrees[6] found in *Rufo v. Inmates of Suffolk County Jail*[7] and urged district courts to return the "responsibility for discharging the State's obligations" promptly to state officials once "the objects of the decree have been attained."[8]

On remand, we returned the case to the district court ("*Frew IV*").[9] Defendants moved to dissolve the Decree under Rule 60(b)(5)'s third clause, claiming that its continued enforcement would be inequitable.[10] The district court, applying *Rufo* and *Frew III*, denied their motion, and we affirmed ("*Frew V*").[11]

Back in the district court, the parties agreed on eleven corrective action orders, each aimed at bringing Defendants into compliance with a specific portion of the Decree. CAO 637-8, the order at issue in this appeal, implemented ¶¶ 124-30 of the Decree, which concerned deficiencies in Medicaid-participating pharmacies' understanding of EPSDT. All eleven orders were entered into the record in 2007.[12]

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[6] *Id.*

[7] 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992).

[8] *Frew*, 540 U.S. at 442, 124 S.Ct. 899.

[9] *See Frazar v. Hawkins*, 376 F.3d 444, 447 (5th Cir.2004).

[10] *See Frew v. Hawkins*, 401 F.Supp.2d 619, 631 (E.D.Tex.2005).

[11] *See Frazar v. Ladd*, 457 F.3d 432, 434 (5th Cir.2006).

[12] In 2009, the case was transferred by Judge William Wayne Justice, who had overseen the case from its inception, to Judge Richard Schell.

B. Consent Decree ¶¶ 124-30 and CAO 637-8

1. Consent Decree ¶¶ 124-30

The 78-page Decree is organized into 308 paragraphs, of which only 7 are involved in this appeal. Paragraphs 124-30 form one subsection of a larger section that calls for a variety of training initiatives for healthcare providers. Of these 7 paragraphs, 2 mandate that Defendants perform specific actions:

> 129. By January 31, 1996, Defendants will implement an initiative to effectively inform pharmacists about EPSDT, and in particular about EPSDT's coverage of items found in pharmacies. The effort will include presentations at meetings of the Texas Pharmaceutical Association and other appropriate organizations, if possible, articles in the TPA newsletter, if possible, and at least one mail out to all pharmacists who participate in the Medicaid program. The mail out will be designed to attract pharmacists' attention, explain EPSDT coverage clearly and encourage pharmacists to provide the full gamut of covered pharmaceutical products to recipients as needed.
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> 130. By July 31, 1996, Defendants will conduct a professional and valid evaluation of pharmacists' knowledge of EPSDT coverage of items commonly found in pharmacies. They will report the results of the evaluation to Plaintiffs by September 1, 1996. If the parties agree that pharmacists' understanding of the program is acceptable, Defendants

> will continue the initiative described above to inform pharmacists about EPSDT. If the parties do not agree, or if pharmacists' understanding is unacceptable, Defendants will conduct an initiative to orally inform pharmacists about EPSDT's coverage. Plaintiffs will not unreasonably disagree about whether pharmacists' understanding is acceptable.[13]

Plaintiffs contend that three other paragraphs of the Decree are relevant: ¶ 3, which declares that "[r]ecipients are also entitled to all needed follow up health care services that are permitted by federal Medicaid law"; ¶ 6, which describes the purpose of the Decree as "[t]o address the parties' concerns, to enhance recipients' access to health care, and to foster the improved use of health care services by Texas EPSDT recipients"; and ¶ 190, which states that "EPSDT recipients served by managed care organizations are entitled to timely receipt of the full range of EPSDT

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[13] Paragraph 124 describes the critical role that pharmacies play in the Program. Paragraph 125 introduces Plaintiffs' complaints: Pharmacists do not understand EPSDT's requirements, such as the fact that over-the-counter medications are covered if prescribed by a doctor. Paragraph 126 states that EPSDT also covers medically necessary infant formula, diapers, and other supplies and equipment "commonly sold in pharmacies." Paragraph 127 continues Plaintiffs' complaints: Pharmacies that do not understand EPSDT require Medicaid recipients to pay in cash; recipients often do not have cash or end up erroneously paying for covered items. Paragraph 128 states Defendants' disagreement with these facts.

services, including but not limited to medical and dental check ups."[14]

2. CAO 637-8

This corrective action order begins by referencing ¶¶ 3, 129, and 130 of the Decree. It then describes Plaintiffs' main complaint with pharmacists' understanding of EPSDT's prescription drug program: When EPSDT recipients seek to fill prescriptions for drugs that are not listed on the Program's Preferred Drug List ("PDL"), pharmacists may fill them only if they have "prior authorization" from the prescribing physicians. If a prescribing physician does not provide the authorization or could not be reached, the pharmacist must dispense a 72-hour emergency supply so that the class member is not deprived of needed medication. Many pharmacists, however, did not know that the stopgap measure was available or treated it as optional and improperly withheld class members' prescriptions.

To remedy the pharmacists' misunderstanding, CAO 637-8 established a detailed series of action items, elaborating on and expanding the requirements found in ¶¶ 124-30 of the Decree. CAO 637-8 is divided into 12 bullet points, of which 9 require

[14] In March 2012, the EPSDT prescription drug program was transferred from direct state control to the control of managed care organizations. All Texas EPSDT recipients are now served by managed care organizations.

specific actions by Defendants. Particularly contested in this appeal are their obligations in bullet points 6 and 10.[15]

Bullet point 6 required Defendants to "provide intensive, targeted educational efforts to those pharmacies for which the data suggests a lack of knowledge of the 72-hour emergency prescriptions policy."[16] In addition to these "intensive, targeted" efforts for particular noncompliant pharmacies, Defendants were also to "continue . . . educational efforts with respect to all Medicaid pharmacies."

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[15] CAO 637-8 also requires Defendants to (1) change the Program's electronic prescription processing system so that it reminds pharmacists of the 72-hour emergency policy; (2) "work with the Texas Pharmacy Association to explain" the policy; (3) make available a PDL database service that doctors may use online or download to a handheld device for reference while providing care; (4) "begin encouraging all Medicaid-enrolled pharmacies to also become Medicaid-enrolled providers of durable medical equipment"; (5) provide information about the 72-hour policy and Medicaid's coverage of durable medical equipment every time a pharmacy signs a new, renewed, or amended contract to participate in Medicaid; and (6) encourage managed care organizations to train the nurses who staff their patient hotlines about the 72-hour and durable medical equipment policies.

[16] The previous bullet point had required Defendants to identify these target pharmacies by performing an analysis of all pharmacies' claims histories, which would reveal those that processed zero or a lower-than-expected number of 72-hour emergency prescriptions. Within two years of completing this analysis, Defendants were to repeat it. The final bullet point in CAO 637-8 required the parties to confer after the second analysis was complete "to determine what, if any, further action [was] required."

Bullet point 10 required Defendants to train staff at their ombudsman's office "about the emergency prescription standards," including "what steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines."

C. Current Proceedings

In 2012, Plaintiffs moved to enforce the pharmacy aspects of the Decree and CAO 637-8, contending that further action was required because the training efforts had not been effective. They asked the court to "require that Defendants develop a plan thorough and vigorous enough to eradicate the severe systemic dysfunction" still remaining in the interaction between pharmacies and EPSDT. Defendants countered, claiming that they had "satisfied the terms of the CAO," and moved to dissolve CAO 637-8 and Decree ¶¶ 124-30 "under the first ground set forth in Rule 60(b)(5)." They did not seek relief pursuant to the Rule's second or third grounds.

After a hearing, the district court agreed that Defendants had "substantially complied with the terms of CAO 637-8 and Decree [¶¶] 124-130" and granted their Rule 60(b)(5) motion. The court also found that Plaintiffs had conceded Defendants' compliance with all action items besides those in bullet points 6 and 10.

II. Analysis

A. Standard of Review

"Consent decrees are subject to Federal Rule of Civil Procedure 60(b)."[17] We review a district court's decision to grant or deny relief pursuant to Rule 60(b) for abuse of discretion.[18] Under this standard, the district court's ruling is "entitled to deference," but we review *de novo* "any questions of law underlying the district court's decision."[19]

Plaintiffs urge that *Frew I*, in which Judge Justice construed various provisions of the Decree, is entitled to deference as "the law of the case." They appear to find this rule in a line of Sixth Circuit cases that apply "deferential de novo" review to interpretations of consent decrees by the judges who initially approved them.[20] We have never followed this rule. Moreover, the law of the case doctrine "generally operates to preclude a reexamination of issues decided on *appeal*."[21] The only decisions that form the law of this case are the Supreme Court's opinion in *Frew III* and our previous panel opinions in *Frew II, Frew IV*,

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[17] *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 437 (5th Cir.2011).

[18] *Id.*

[19] *Frazar v. Ladd*, 457 F.3d 432, 435 (5th Cir.2006).

[20] *Shy v. Navistar Int'l Corp.*, 701 F.3d 523, 528 (6th Cir.2012); *see also*, *e.g.*, *Brown v. Neeb*, 644 F.2d 551, 558 n. 12 (6th Cir.1981).

[21] *Conway v. Chem. Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061 (5th Cir. Unit A May 1981) (emphasis added).

and *Frew V.* None of these interpret ¶¶ 124-30 of the Decree; CAO 637-8 did not even exist at the time of *Frew V.* We thus decline Plaintiffs' invitation to apply our law of the case doctrine here.

B. Rule 60(b)(5)

Consent decrees, like other judgments, may be modified or terminated pursuant to Rule 60(b)(5), which provides three independent, alternative grounds for relief: "[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."[22] As the party seeking relief, Defendants must bear the burden of showing that Rule 60(b)(5) applies.[23]

The vast majority of motions for modification and termination of consent decrees, especially those involving institutional reform, invoke Rule 60(b)(5)'s third clause.[24] In contrast, the first clause of Rule

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[22] FED.R.CIV.P. 60(b)(5); *see also Horne v. Flores*, 557 U.S. 433, 454, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009) ("Satisfaction of an earlier judgment is one of the enumerated bases for Rule 60(b)(5) relief – but it is not the only basis for such relief. . . . Use of the disjunctive 'or' makes it clear that each of the provision's three grounds for relief is independently sufficient. . . .").

[23] *See League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 438 (5th Cir.2011).

[24] *See* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2863 (3d ed.2012) ("The significant portion of Rule 60(b)(5) is the final ground, allowing relief if it is no longer equitable for

(Continued on following page)

60(b)(5) is raised far less often – typically when there is a dispute over the amount of the judgment[25] – and is almost never applied to consent decrees.[26] As such, we find very little applicable precedent interpreting this clause.

Defendants urge us to import the principles of *Frew III* to this case, as the Decree implicates the exact same federalism concerns as before. Plaintiffs' response – that *Frew III's* hortatory language about state accountability pertains only to Rule 60(b)(5)'s third clause – is technically accurate, but fails to account for Rule 60(b)'s expansive scope:

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the judgment to be applied prospectively."); *see also Horne*, 557 U.S. at 447, 129 S.Ct. 2579 (applying the third clause); *Agostini v. Felton*, 521 U.S. 203, 215, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (same); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 376, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) (noting that one party sought modification of a consent decree on the basis of alleged changes in law and fact, which pertain to Rule 60(b)(5)'s third clause).

[25] *See, e.g.*, *Bryan v. Erie Cnty. Office of Children & Youth*, 752 F.3d 316, 321 (3d Cir.2014); *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 517 F.3d 1271, 1274 (11th Cir.2008); *Zamani v. Carnes*, 491 F.3d 990, 995 (9th Cir.2007); *Newhouse v. McCormick & Co.*, 157 F.3d 582, 584 (8th Cir.1998); *Redfield v. Ins. Co. of N. Am.*, 940 F.2d 542, 544 (9th Cir.1991); *Torres-Troche v. Municipality of Yauco*, 873 F.2d 499, 501 (1st Cir.1989); *Sunderland v. City of Phila.*, 575 F.2d 1089, 1090 (3d Cir.1978).

[26] *See* 11 WRIGHT, MILLER & KANE, *supra* note 24, § 2863 ("The first of the grounds set out in Rule 60(b)(5), that the judgment has been satisfied, released or discharged, has been relied on very rarely.").

> We have repeatedly noted that Rule 60(b) is to be given a liberal construction: "In analyzing the 60(b) aspect, [w]e recognize that Rule 60(b) is to be construed liberally to do substantial justice. The rule is broadly phrased and many of the itemized grounds are overlapping, freeing Courts to do justice in hard cases where the circumstances generally measure up to one or more of the itemized grounds."[27]

In light of this statement and the lack of other precedent, we deem it reasonable to consider Defendants' motion with reference to the Supreme Court's unambiguous instructions in *Frew III*.

C. Consent Decree Interpretation

Consent decrees are construed according to "general principles of contract interpretation."[28] "The primary concern of a court in construing a written contract is to ascertain the true intentions of the

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[27] *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 600 (5th Cir.1980) (quoting *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823 (5th Cir.1965)).

[28] *Dean v. City of Shreveport*, 438 F.3d 448, 460 (5th Cir.2006). Furthermore, the court "look[s] to state law to provide the rules of contract interpretation." *Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 352 (5th Cir.1996). Plaintiffs cite to Texas contract law, and we have previously applied Texas law in cases involving consent decrees concluded between Texas parties. *See, e.g.*, *City of El Paso, Tex. v. El Paso Entm't, Inc.*, 464 Fed.Appx. 366, 372 (5th Cir.2012) (per curiam) (unpublished).

parties *as expressed in the instrument.*"[29] Thus, courts examine the "unambiguous language in a contract" and enforce "'the objective intent' evidenced by the language used."[30] This reliance on the written terms must include consideration of *all* the terms: "[C]ourts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless."[31] "Indeed, courts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract."[32]

Plaintiffs contend that the district court erred in focusing narrowly on Defendants' satisfaction of specific provisions of CAO 637-8 and not considering the Decree's broader goals, as found in ¶¶ 3, 6, and 190. The purpose of the Decree, according to Plaintiffs, is *results*-oriented: It is not enough for Defendants to perform the required action items mechanically; the court must also find that these actions were effective in improving EPSDT recipients' access to health care. Plaintiffs conclude that, because the district court failed to construe the Decree as a whole document, it

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[29] *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir.2006) (emphasis added).

[30] *Clardy*, 88 F.3d at 352.

[31] *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983).

[32] *Am. Tobacco Co.*, 463 F.3d at 408 (quoting *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex.1995)) (internal quotation marks omitted).

misapplied the rules of contract interpretation and erred as a matter of law.

Plaintiffs' recitation of the rules of contract interpretation is correct, but interpreting the Decree as an entire writing does not give Plaintiffs the victory they seek. In ¶¶ 3 and 190, the Decree states the uncontroversial position that Plaintiffs, including those served by managed care organizations, are entitled to EPSDT benefits as mandated by Medicaid. In ¶¶ 4 and 5, the Decree opines that Texas's implementation of EPSDT could and should be improved. Then, in ¶ 6, the Decree introduces the "changes and procedures" agreed to by the parties to effectuate this improvement, noting that these actions are in place "[t]o address the parties' concerns, to enhance recipients' access to health care, and to foster the improved use of health care services by Texas EPSDT recipients." These introductory paragraphs do not guarantee specific outcomes; rather, they show that the Decree is aimed at *supporting* EPSDT recipients in obtaining the health care services they are entitled to, by *addressing* concerns, *enhancing* access, and *fostering* use of services.

Defendants therefore fulfill the purpose of the Decree by implementing the broad range of supportive initiatives memorialized *in the Decree*.[33] The

[33] *See id.* at 407 ("The primary concern of a court in construing a written contract is to ascertain the true intentions of the parties *as expressed in the instrument*." (emphasis added)).

whole point of negotiating and agreeing on a plethora of specific, highly detailed action plans was to establish a clearly defined roadmap for attempting to achieve the Decree's purpose. In other words, the parties *already agreed* that substantial compliance with this roadmap would achieve their common goal.

To read the Decree as implying a secondary assessment of the impact of each action item would introduce a new requirement to which the parties never agreed. The Decree makes no guarantees of success and sets no results-based milestones; neither do ¶¶ 124-30 establish any objective standard that pharmacists must achieve before Defendants' educational efforts may be considered successful.

Plaintiffs have not pointed to any discrete endpoint for CAO 637-8 or these Decree paragraphs. Indeed, they may *never* be satisfied with Defendants' educational efforts: In their 2012 motion to enforce the Decree and CAO 637-8, Plaintiffs appeared to have given up on pharmacist training entirely. Acknowledging that "[n]o amount of education will cure the pervasive dysfunction in Defendants' deeply flawed system," Plaintiffs instead wanted Defendants to "propose a further action plan" to effectuate "systematic change" to the prescription drug program itself. Neither the rules of contract interpretation nor *Frew III's* instruction to "promptly" return state programs to state control countenance this rewriting of the Decree.

Plaintiffs also point to the word "effectively" in ¶ 129: Defendants were required to "implement an initiative to effectively inform pharmacists about EPSDT." Plaintiffs reason that if many EPSDT recipients are still not receiving their prescription drug benefits, Defendants' educational initiative must not have been effective. Reading ¶ 129 as a whole, however, reveals that "effectively" functions to require that all "presentations," "articles," and "mail out" initiatives conducted by Defendants *convey information* effectively. Paragraph 129 even provides some guidelines for effective communication, instructing Defendants to design mailings "to attract pharmacists' attention" and "explain EPSDT coverage clearly." Defendants were obligated to communicate information in an effective manner, no more. To 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.[34]

Finally, Plaintiffs rely heavily on the Ninth Circuit's opinion in *Jeff D. v. Otter*, which held that "[e]xplicit consideration of the goals of [the consent decree], and whether those goals have been adequately

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[34] *See id.* at 408 ("Indeed, courts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract." (quoting *State Farm*, 907 S.W.2d at 433) (internal quotation marks omitted)).

served, must be part of the determination to vacate."[35] But *Jeff D.* is inapposite for two reasons. First, the Ninth Circuit's reasoning rested on two school desegregation cases,[36] which present unique issues in consent decree jurisprudence,[37] and on a case that appears to have considered the flexible standard for modifying consent decrees, a standard associated with the *third* clause of Rule 60(b)(5).[38] Thus, *Jeff D.'s* persuasiveness is limited. Second, the consent decree at issue in *Jeff D.* "provided for continuing jurisdiction by the district court for five years 'or until [the district court was] satisfied by stipulation or otherwise that the *claims as alleged in the Complaint* have been adequately addressed.'"[39] The *Jeff D.* parties bargained for a termination condition that included

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[35] 643 F.3d 278, 289 (9th Cir.2011).

[36] *See id.* at 288 (citing *Freeman v. Pitts*, 503 U.S. 467, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992); *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir.1991)).

[37] In *Frew V*, Defendants contended that the proper legal standard for terminating consent decrees was that found in the Supreme Court's school desegregation cases, but we expressly declined to rule on that question. *See Frazar v. Ladd*, 457 F.3d 432, 440 (5th Cir.2006). No party relies on the desegregation cases in this appeal. Owing to school desegregation's unique legal history, the consent decree modification standards articulated in *Freeman* and similar cases may be of limited applicability. We have cited *Freeman* almost exclusively in other school desegregation cases.

[38] *See Jeff D.*, 643 F.3d at 288 (citing *United States v. City of Miami*, 2 F.3d 1497 (11th Cir.1993) (considering the "flexible standard" from *Rufo*)).

[39] *Id.* at 281 (emphasis added).

an independent assessment by the district court of whether the plaintiffs' complaints had been resolved. Thus, when the district court vacated the consent decree after assessing compliance with the specific action items only, it did not give the plaintiffs the benefit of their bargain.[40] Although the Ninth Circuit did not emphasize this fact, we find *Jeff D.* to be distinguishable on this basis.

In conclusion, we reject Plaintiffs' contention that the district court incorrectly interpreted the Decree in deciding Defendants' motion to terminate CAO 637-8 and Decree ¶¶ 124-30. If the Decree had explicitly guaranteed pharmacists' compliance, provided an objective standard for assessing the effectiveness of Defendants' actions, or set termination conditions referencing satisfaction of the Decree's overall purpose, Plaintiffs might legitimately complain about the district court's approach. As it is, the district court did not err in interpreting CAO 637-8 and ¶¶ 124-30 to mandate specific actions only, the performance of which would automatically satisfy the parties' intent in concluding these agreements.

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[40] No similar provision exists in the Decree or in CAO 637-8. The closest analogue is CAO 637-8's instruction for "counsel . . . [to] confer to determine what, if any, further action is required" after Defendants complete the second study of pharmacists' claims history. If the parties cannot agree, then the court may step in. There is nothing, however, instructing the court to resolve the dispute with reference to the Decree's overall purpose.

D. Dissolution of Consent Decree ¶¶ 124-30 and CAO 637-8

Plaintiffs also challenge the district court's conclusion that Defendants have substantially complied with CAO 637-8 and Decree ¶¶ 124-30. In determining that a party to a contract has fulfilled its contractual obligations, Texas law allows substantial compliance.[41] "Substantial compliance excuses deviations from a contract's provisions that do not severely impair the contractual provision's purpose."[42]

The district court found that Defendants had substantially complied with the requirements of bullet points 6 and 10 in CAO 637-8 and ¶¶ 124-30 of the Decree. It did not make any specific findings with respect to the other bullet points in the CAO, as it determined that "[a]t the court's hearing on these motions, Plaintiffs acknowledged that Defendants substantially complied with all but two of the paragraphs of CAO 637-8."

Plaintiffs dispute that they made this concession, but their brief acknowledges that, during the hearing on Defendants' motion, their counsel agreed with the court that "some discrete efforts took place." A review

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[41] *See Turrill v. Life Ins. Co. of N. Am.*, 753 F.2d 1322, 1326 (5th Cir.1985).

[42] *Interstate Contracting Corp. v. City of Dall., Tex.*, 407 F.3d 708, 727 (5th Cir.2005); *see also id.* (noting that substantial compliance is not the legal equivalent of strict compliance if the contract *expressly* calls for the latter).

of the hearing transcript confirms the propriety of the district court's ruling. Counsel agreed that Defendants had (1) made a Medicaid PDL service available; (2) implemented an electronic system for filling EPSDT prescriptions; (3) worked with the Texas Pharmacy Association to educate its members; (4) conducted two studies of pharmacies' claims histories;[43] (5) encouraged pharmacies to provide durable medical equipment; (6) provided EPSDT materials to pharmacies when concluding new contracts; and (7) encouraged managed care organizations to train their personnel in EPSDT. Although counsel consistently disputed the *effectiveness* of Defendants' efforts, the relevant issue for determining substantial compliance is completion, and Plaintiffs have conceded that Defendants completed all but two of the bullet points in CAO 637-8.

As for the two disputed bullet points, the district court's determination that Defendants have substantially complied with their obligations is consistent with the record. With respect to bullet point 6, which required Defendants to educate pharmacies that filled below-expected numbers of 72-hour emergency prescriptions in an "intensive, targeted" manner, Plaintiffs assert that Defendants' efforts were not sufficiently "intensive." But the district court found

[43] Plaintiffs' counsel agreed that "[t]hey have conducted two studies fairly close to what the corrective action order required," noting that the studies were "not compliant with [CAO 637-8], but fairly close." The district court did not abuse its discretion to hold that this statement demonstrated a concession of *substantial* compliance. *See id.*

Defendants' actions – mailing certified letters to 822 pharmacies, visiting or calling the ones that did not receive the letter, and contacting corporate chain offices – to be sufficient. During oral argument, Plaintiffs' counsel also took issue with the content of the certified letter, contending that it "never told the pharmacists that they *must* provide the 72-hour prescription." According to counsel, the letter left out "the critical part" of the program – that this 72-hour emergency prescription was mandatory, not discretionary. Thus, "the whole system fell apart" because "the pharmacists think they have discretion, or they don't have to, or it's only permissive that they provide the 72-hour medication." After reviewing the mailing, however, we see no basis for this complaint. The letter told pharmacies that they "should dispense the 72-hour emergency supply"; the enclosed "Texas Medicaid Pharmacists' Guide to Dispensing 72-Hour Emergency Prescriptions" clearly stated that "[f]ederal and Texas law **requires** that a 72-hour emergency supply of a prescribed drug be provided." The district court did not err in concluding that Defendants have fulfilled their obligations under bullet point 6.

With respect to bullet point 10, which required Defendants to train personnel in their ombudsman's office, Plaintiffs' complaints, essentially, are that any evidence of training is insufficiently detailed and conclusional. The district court relied on three declarations from state employees who testified that multiple training sessions occurred for ombudsman's office staff. Although Plaintiffs would prefer the district court not to credit these statements, absent any

indicia of unreliability other than Plaintiffs' unsubstantiated accusations of bias, the court's decision to do so is not clearly erroneous.

Finally, Plaintiffs contend that the district court erred in dissolving Decree ¶¶ 124-30 because it did not find that Defendants' actions were effective. As already discussed, the word "effectively" in ¶ 129 applies to the Defendants' communication obligation, not to the participating pharmacies' compliance. The district court rejected Plaintiffs' contention that the phrase "Defendants will implement an initiative to effectively inform pharmacists about EPSDT" meant ensuring that all Texas EPSDT recipients actually received all of their pharmacy benefits. The court noted that Plaintiffs had agreed that Defendants had completed the discrete, information-conveying actions required by this section of the Decree. This determination was not clearly erroneous.

III. Conclusion

Defendants have fulfilled their obligations to provide training on and make improvements to EPSDT's prescription drug program. The district court did not abuse its discretion in dissolving CAO 637-8 and ¶¶ 124-30 of the Decree pursuant to Defendant's motion for relief under the first clause of Rule 60(b)(5). Accordingly, the judgment of the district court is AFFIRMED.

5 F.Supp.3d 845
United States District Court,
E.D. Texas, Sherman Division.

Linda Frew, et al., Plaintiffs,
v.

Kyle L. Janek, M.D., Defendant.

Case No. 3:93-CV-65 | Filed 12/18/2013

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION TO ENFORCE AND GRANTING DEFENDANTS' MOTION TO DISSOLVE CORRECTIVE ACTION ORDER: PRESCRIPTION AND NON-PRESCRIPTION MEDICATIONS, MEDICAL EQUIPMENT AND SUPPLIES [DE # 637-8]

RICHARD A. SCHELL, UNITED STATES DISTRICT JUDGE

Pending before the court is Plaintiffs' Motion to Enforce the Corrective Action Order: Prescription and Non-Prescription Medications, Medical Equipment and Supplies, and Related Decree Provisions (Dkt.971); Defendants' Rule 60(b)(5) Motion to Dissolve

the Corrective Action Order on Prescription and Non-Prescription Medications, Medical Equipment and Supplies, and Related Consent Decree Provisions and Response in Opposition to Plaintiffs' Motion to Enforce the Corrective Action Order (Dkt.998); Plaintiffs' Response (Dkt.1004); Defendants' Reply (Dkt.1019); and Plaintiffs' Sur-Reply (Dkt.1026). Also pending before the court is Defendants' Motion to Strike the Testimony of Drs. Mazur, Whitney, Wood and Rider In Part or In Whole (Dkt.1023) and Plaintiffs' Response (Dkt.1027). The court held a hearing on September 9, 2013 and heard argument from the parties on these pending motions. After considering the briefing and the arguments of both parties and for the reasons set forth herein Plaintiffs' Motion for Further Action (Dkt.971) is **DENIED**, Defendants' Rule 60(b)(5) Motion (Dkt.998) is **GRANTED**. Defendants' Motion to Strike (Dkt.1023) is **DENIED**. Also pending before the court is Plaintiffs' Motion to Pay Expert Witnesses (Dkt.1043), Defendants' Response (Dkt.1045), and Plaintiffs' Reply (Dkt.1046), which is **GRANTED**.

I. BACKGROUND

A detailed background of this case can be found in previously issued opinions.[1] On September 1, 1993,

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[1] *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, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004); *Frew v. Hawkins*, 401 F.Supp.2d 619 (E.D.Tex.2005); *Frew v. Suehs*, 775 F.Supp.2d 930 (E.D.Tex.2011).

Plaintiffs filed this lawsuit alleging that Defendants (the successive commissioners of the Texas Health and Human Services Commission and the Texas Department of Health) did not adequately provide Early Periodic Screening, Diagnosis and Treatment (EPSDT) services to Medicaid recipients under the age of twenty-one as required by the Medicaid Act, Title 42, United States Code, Sections 1396a(a)(43) and 1396d(r). In Texas, the EPSDT program is referred to as "Texas Health Steps" and is administered jointly by the federal government and the Texas Health and Human Services Commission. The Plaintiffs structured this case as a class action and defined the class broadly to include all Texas youth eligible to receive Medicaid. The Plaintiffs sought injunctive relief to ensure that the state complied with the Medicaid Act. The primary governing documents in this case are the "Consent Decree" (Dkt.135) and the "Corrective Action Orders" (Dkt.637).

a. The Consent Decree

In July 1995, after extensive settlement negotiations, the parties proposed a Consent Decree that was subsequently approved by the court on February 16, 1996 (Dkt.135). The Decree is a court-enforced settlement agreement that sets forth a compliance plan for the State's EPSDT program.[2] The Decree was not

[2] *See Frew v. Hawkins*, 540 U.S. 431, 437, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004) ("A consent decree 'embodies an agreement of the parties' and is also 'an agreement that the parties

(Continued on following page)

intended to resolve all the contested issues between the parties. Rather, it was designed to reduce the nature and scope of the litigation. The Decree discusses in detail the areas in which the State's EPSDT program was deficient, sets goals and requirements for improvements, and establishes deadlines for the State's implementation of the improvements.

In 1998, Plaintiffs moved to enforce the Decree, arguing that Defendants were not complying with several of the Decree's provisions (Dkt.208). Defendants opposed the motion, arguing that their efforts had been sufficient and that, regardless of their efforts, the Eleventh Amendment barred the court from enforcing the Decree. In 2000, this court held that the State had failed to comply with several of the Decree's provisions and that the Eleventh Amendment did not bar enforcement of the Decree.[3] On appeal the Fifth Circuit disagreed with the court and held that the Eleventh Amendment barred enforcement of elements of the Decree that were not specifically mandated by the Medicaid Act.[4] The U.S. Supreme Court reversed the Fifth Circuit, holding that the Decree was enforceable under the principals [sic] of

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desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.' ") (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992)).

[3] *Frew v. Gilbert*, 109 F.Supp.2d 579 (E.D.Tex.2000).

[4] *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir.2002).

Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) because the Decree addressed federal interests.[5] The case was remanded to this court for continued oversight.

b. The Corrective Action Orders

In November 2004, Defendants moved to terminate or alternatively to modify the Decree under Federal Rule of Civil Procedure 60(b)(5) (Dkt.406). The basis for Defendants' motion was that even though they had not yet fulfilled the Decree their efforts had brought them into compliance with the Medicaid Act. The court denied the Defendants' motion, holding that compliance with the federal law was not the sole object of the Decree.[6] Defendants' appeals to the Fifth Circuit and the U.S. Supreme Court were unsuccessful.[7]

Plaintiffs eventually filed three other motions relating to enforcement of the Decree (Dkts.607, 429, 428). In 2007, the parties reached an agreement on the pending motions that set forth corrective action plans for eleven areas of the EPSDT program that had been addressed in the Decree. The parties filed their proposed agreement with the court on April 27,

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[5] *Frew v. Hawkins*, 540 U.S. 431, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004).

[6] *Frew v. Hawkins*, 401 F.Supp.2d 619 (E.D.Tex.2005).

[7] *See Frazar v. Ladd*, 457 F.3d 432 (5th Cir.2006), *cert. denied*, 549 U.S. 1118, 127 S.Ct. 1039, 166 L.Ed.2d 714 (2007).

2007 (Dkt.637). The court orally approved the agreement at a July 9, 2007 hearing and subsequently entered the agreement as the Corrective Action Order (CAO) on September 5, 2007 (Dkt.663). On April 17, 2009, the case was transferred by the Honorable William Wayne Justice to the undersigned judge (Dkt.716).

The Corrective Action Order presently at issue is Dkt. 637-8.[8] Defendants represent that they have complied with the obligations set forth in CAO 637-8 and paragraphs 124-130 of the Decree. The provisions in dispute relate to training for pharmacists that provide prescription and non-prescription medication and other medical supplies to class members. Plaintiffs request that the court order Defendants to take further action. Defendants request that they be relieved from their obligations under CAO 637-8 and Decree paragraphs 124-130 because they have satisfied the judgment.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 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

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[8] Corrective Action Order: Prescription and Non-Prescription Medications; Medical Equipment and Supplies, Dkt. 637-8 [hereinafter CAO 637-8].

prospectively is no longer equitable. "General principles of contract interpretation govern the interpretation of a consent decree."[9] "[C]onsent decrees are to be construed only by reference to the 'four corners' of the order itself."[10]

"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."[11] Indeed, "institutional reform injunctions often raise sensitive federalism concerns."[12] "Federalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities."[13] Consent decrees "sometimes go well beyond what is required" by underlying statutes and may "improperly deprive future officials of their designated legislative and executive powers."[14] "Where state and local officials inherit overbroad or outdated consent decrees that limit their ability to

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[9] *United States v. Chromalloy Am. Corp.*, 158 F.3d 345, 349 (5th Cir.1998).

[10] *Id.*

[11] *Horne v. Flores*, 557 U.S. 433, 447-48, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009) (internal quotation marks and citations omitted).

[12] *Id.* at 448, 129 S.Ct. 2579.

[13] *Id.*

[14] *Id.* at 448-49, 129 S.Ct. 2579 (internal quotation marks omitted).

respond to the priorities and concerns of their constituents, they are constrained in their ability to fulfill their duties as democratically-elected officials."[15] 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 obligations is returned promptly to the State and its officials."[16]

III. ANALYSIS

a. Defendants' Motion to Strike Testimony (Dkt.1023)

Defendants move to strike the testimony of Drs. Mazur, Whitney, Wood and Rider submitted by Plaintiffs in connection with their Motion for Further Action (Dkt.971). Defendants object to the designation of these doctors as experts. Defendants do not question the qualifications or credentials of these witnesses to offer expert testimony as medical doctors. However, Defendants argue that these witnesses are not qualified to offer an opinion as experts with respect to Defendants' satisfaction of Decree paragraphs 124-130 and CAO 637-8.

Federal Rule of Evidence 702 states that "[a] witness who is qualified as an expert by knowledge,

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[15] *Id.* at 449, 129 S.Ct. 2579 (internal quotation marks omitted).

[16] *Frew v. Hawkins*, 540 U.S. 431, 442, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004).

skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." The witnesses' opinions in this instance are not based on any specialized knowledge. Instead, the witnesses offer largely anecdotal evidence about problems that either they or their colleagues have experienced with patients attempting to get prescriptions filled through Medicaid-enrolled pharmacies. This testimony does not rely on the doctors' scientific, technical, or specialized knowledge. Therefore, the doctors have not offered "expert" opinions regarding whether Defendants are in compliance with the terms of the Decree and the CAO. However, portions of the doctors' testimony are relevant, although unpersuasive, in determining the effectiveness of the Defendants' efforts to comply with the Consent Decree and CAO 637-8. The court has considered only those portions of the doctors' testimony that are relevant to the court's analysis of the instant motions. The Motion to Strike (Dkt.1023) is **DENIED**.

b. Plaintiffs' Motion to Enforce Order Requiring Defendants to Pay a Fair and Reasonable Compensation for Plaintiffs' Experts' Time (Dkt.1043)

Plaintiffs' motion for payment of their witness fees (Dkt.1043) is **GRANTED**. Federal Rule of Civil Procedure 26(b)(4)(E) instructs that "[u]nless manifest

injustice would result, the court *must* require that the party *seeking* discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D)." (emphasis added). There is nothing in the Rule or this court's order (Dkt.898) that conditions the requirement of payment on a determination of the ultimate admissibility of the witness's testimony.

c. Plaintiffs' Motion for Further Action (Dkt.971)

Plaintiffs seek an order from this court requiring Defendants to take further action pursuant to CAO 637-8. Defendants oppose the motion and maintain that they have satisfied the terms of CAO 637-8 and the corresponding provisions of the Decree, paragraphs 124-130.

At the court's hearing on these motions, Plaintiffs acknowledged that Defendants substantially complied with all but two of the paragraphs of CAO 637-8.[17] Therefore, the court addresses only those two provisions with which Plaintiffs maintain Defendants have not substantially complied. First, Plaintiffs argue that Defendants have not "provide[d] intensive, targeted educational efforts to those pharmacies for

[17] While acknowledging that Defendants have substantially complied with the specific actions required of them, Plaintiffs do not acknowledge that Defendants' actions have been effective and maintain that Defendants could do more.

which the data suggest a lack of knowledge of the 72-hour emergency prescriptions policy."[18] The CAO explains that pharmacies are allowed to dispense a 72-hour "emergency" allotment of a prescription when a class member arrives at the pharmacy with a prescription that requires a prior authorization from Medicaid or the patient's managed-care organization and the pharmacist is unable to obtain a prior authorization. An example of this is when a class member is treated at an emergency room over a weekend and given a prescription that requires a prior authorization, and the pharmacist is unable to reach the prescribing physician. The pharmacist can dispense a 72-hour allotment of the medication so that the patient has time to follow-up with a physician to either get a prescription for a preferred medication or obtain a prior authorization. Defendants conducted studies to evaluate which pharmacies were dispensing a lower-than-expected number of 72-hour emergency prescriptions. Defendants were then required to provide intensive, targeted educational efforts to those pharmacies.

The majority of the evidence submitted by Plaintiffs is not relevant to determining whether Defendants are in compliance with this requirement of CAO 637-8. For instance, Plaintiffs put forth declaration testimony from doctors about the complexity of Defendants' "Preferred Drug List," frustration with

[18] CAO 637-8 at 4; Dkt. 971 at 11-13.

obtaining prior authorizations, and problems encountered when the state moved to a managed-care system. However, this evidence does not assist the court in determining whether Defendants failed to comply with their obligations under the CAO to provide intensive, targeted education to pharmacists. Defendants have put forth evidence, described below in relation to Defendants' Rule 60(b)(5) motion, which demonstrates that Defendants have complied with the requirements of the CAO.[19] Plaintiffs' belief that Defendants could do more is insufficient for the court to order any further action.

Next, Plaintiffs argue that Defendants have not "train[ed] staff at their ombudsman's office about the emergency prescription standards, what steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines, and DME ["durable medical equipment"] standards and common problems."[20] Plaintiffs cite to call logs provided by Defendants to support their argument that staff at the Ombudsman's Office has not been trained as required by the CAO. Plaintiffs admit that some inquiries to the Ombudsman's Office have been handled appropriately. Plaintiffs take issue with those instances where Ombudsman's Office staff has referred class members to their managed-care organizations or instructed them to follow up with

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[19] *See infra* Part III.d.

[20] CAO 637-8 at 5.

their primary-care providers to obtain a prior authorization. These instances do not necessarily show a lack of training of the Ombudsman's Office staff. Defendants rely on declarations of Maribel Castoreno (Dkt.998-2), Laura Bagheri (Dkt.998-4), and Dawn Rehbein (Dkt.998-10) to explain how the actions taken by the Ombudsman's Office staff conform to their training and are designed and intended to immediately address class members' problems. The court can only require Defendants to comply with the requirements of the Consent Decree and the CAO, and Defendants have put forth evidence to show that they have provided training to the staff at their Ombudsman's Office as required by this court's order.[21]

Two paragraphs of the portion of the Consent Decree at issue require Defendants to take specific actions. Paragraph 129 requires Defendants to "implement an initiative to effectively inform pharmacists about EPSDT, and in particular EPSDT's coverage of items found in pharmacies" by making presentations at meetings of the Texas Pharmacy Association, publishing articles in the newsletter of the Texas Pharmacy Association, and sending at least one mailer that is (1) designed to attract attention, (2) explain EPSDT coverage, and (3) encourage pharmacists to provide all covered products, to all pharmacists that participate in Medicaid by January 31,

[21] *See infra* Part III.d.

1996. Paragraph 130 requires Defendants to "conduct a professional and valid evaluation of pharmacists' knowledge of EPSDT coverage" and report their findings to Plaintiffs by January 31, 1996. If the evaluation demonstrated that pharmacists' knowledge was insufficient, Defendants were required to orally inform pharmacists about EPSDT coverage. Defendants contend that they have complied with this obligation as demonstrated by their Quarterly Monitoring Reports,[22] and that no further action should be required. Plaintiffs contend that while Defendants have taken these discrete actions, Defendants have not *effectively* educated pharmacists about EPDST and therefore further action should be required under the Decree.

Plaintiffs' argument would require the court to create and read into the Decree and the CAO more than what is required by the agreed-upon terms. The terms of a consent decree "are arrived at through mutual agreement of the parties" after careful negotiation, and "it is the parties' agreement that serves as the source of the court's authority to enter any

[22] *See* Dkt. 651 at 35; Dkt. 670 at 30-32; Dkt. 676 at 29-31; Dkt. 681 at 36-38; Dkt. 689 at 42-43; Dkt. 701 at 38-40; Dkt. 710 at 30-31; Dkt. 723 at 38-39; Dkt. 726 at 2-3, 47-50; Dkt. 740 at 1-2, 45-47; Dkt. 751 at 55-57; Dkt. 758 at 59-62; Dkt. 775 at 61-63; Dkt. 800 at 58-62; Dkt. 813 at 48-50; Dkt. 825 at 46-48; Dkt. 828 at 47-50; Dkt. 836 at 54-58; Dkt. 868 at 53-57; Dkt. 903 at 57-61; Dkt. 919 at 41-45; Dkt. 961 at 45-46; Dkt. 998-1.

judgment at all."[23] "Courts should not impose their own terms within a consent decree and should read consent decree terms by their plain meaning."[24] A consent decree embodies agreements reached "after careful negotiation has produced agreement on [its] precise terms."[25] "[W]hen a contract is expressed in unambiguous language, its terms will be given their plain meaning and enforced as written."[26] Indeed, "the scope of a consent decree must be discerned within its four corners, not by reference to what either party hoped to achieve by the decree, or to what they might have achieved through the litigation."[27]

Plaintiffs argue that "the entire Medicaid prescription program is now so dysfunctional that education alone cannot possibly solve all the problems thwarting class members' timely access to needed medicines."[28] But the only issue pending before the court is a determination of whether Defendants have complied with paragraphs 124-130 of the Decree and CAO 637-8. Plaintiffs concede that Defendants have

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[23] *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 519, 522, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986).

[24] *United States v. Alcoa, Inc.*, 533 F.3d 278, 286 (5th Cir.2008).

[25] *Local No.* 93, 478 U.S. at 522, 106 S.Ct. 3063.

[26] *United States v. Chromalloy Am. Corp.*, 158 F.3d 345, 350 (5th Cir.1998).

[27] *Frew v. Gilbert*, 109 F.Supp.2d 579, 594 (E.D.Tex.2000) (internal quotation marks omitted).

[28] Dkt. 971 at 22.

complied with most of those terms, and the court cannot require further action from Defendants because Plaintiffs are dissatisfied with the results. Plaintiffs and Defendants agreed on the measures outlined in the Decree and the CAO to educate pharmacists as one way of furthering the overarching goals of the Decree. Plaintiffs' argument that "no amount of education will cure the pervasive dysfunction in Defendants' deeply flawed system"[29] is beyond the scope of the currently pending motions. Plaintiffs' motion for further action (Dkt.971) is **DENIED**.

d. Defendants' Rule 60(b)(5) Motion (Dkt.998)

Defendants move the court to end their obligations under paragraphs 124-130 of the Decree and CAO 637-8 under Rule 60(b)(5) because the judgment has been satisfied. This court's previous order makes 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."[30] The CAOs were intended to "provide[ ] a clear potential end point for Defendants' obligations under the Consent Decree."[31]

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[29] Dkt. 971 at 24.

[30] Mem. Op. 15, Dkt. 663.

[31] *Id.*

As explained above, Plaintiffs acknowledge that Defendants have complied with all but two paragraphs of CAO 637-8. Defendants point to the Declaration of Maribel Castoreno,[32] Texas Health and Human Services Commission's Vendor Drug Program Provider Education and Outreach Specialist in support of their motion related to provision of "intensive, targeted educational efforts" to pharmacies. Ms. Castoreno explains that after conducting the first analysis required by the CAO, Defendants identified 822 pharmacies to be targeted for intensive education. Defendants "sent each identified pharmacy a certified letter, return receipt requested, directed to the pharmacist-in-charge of each pharmacy."[33] The letter "encouraged use of dispensing a 72-hour emergency supply, included citations to federal and state rules and regulations, and provided information explaining how to obtain payment for such emergency prescriptions."[34] Those pharmacists that did not sign for the certified letter were contacted by telephone or were "visited by a Medicaid Regional Pharmacist." Because over half of the pharmacies identified by the first analysis were corporate chains, Defendants "scheduled conference calls with the corporate offices and relevant training staff of CVS, HEB, Walgreens, and Walmart" and sent electronic copies of the letters sent to pharmacists to each of the corporate entities.

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[32] Dkt. 998-2.

[33] Dkt. 998-2 at 8, ¶ 24; *see also* Dkt. 998-1.

[34] Dkt. 998-2 at 8, ¶ 24.

Defendants assert that these actions satisfy the terms of the CAO. Defendants further assert that they went beyond what was required of them by soliciting "a consultant to assist HHSC by identifying specific factors for pharmacies which the data suggested a pattern or lack of knowledge of the 72-hour policy."[35] Defendants then used the consultant's recommendations to "develop possible remedies and additional targeted education for a specific area, pharmacy, or even prescribing provider." Ms. Castoreno's Declaration also outlines Defendants' ongoing statewide efforts to educate pharmacists.[36] Defendants have provided newsletters,[37] fax notices,[38] computer-based training,[39] information on their public

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[35] Dkt. 998-2 ¶ 27.

[36] Dkt. 998-2 at 10-14.

[37] Dkt. 998-2 at 10. "VDP creates a newsletter three to four times per year that is mailed to each active VDP enrolled pharmacy" and posted on the VDP website, emailed to a distribution list that includes pharmacy corporate offices and pharmacy associations, and circulated to HHS email subscribers.

[38] "Defendants use fax notices to circulate relevant news, policy clarifications, and updates, and educational reminders. Defendants fax notices to all active pharmacies that have a fax number on filed [sic] with VDP as well as other pharmacy contacts from the VDP-maintained distribution list."

[39] "A free online training module that relates to THSteps pharmacy benefits is available to all Medicaid providers, including pharmacists, pharmacy staff, and prescribers. It includes information regarding the 72-hour emergency supply of medications and Medicaid coverage of items commonly found in pharmacies . . . This module is available on DSHS' website. VDP's website includes links to these online modules. VDP also promotes the free online pharmacy training module in HHS

(Continued on following page)

website,[40] e-mail notifications,[41] regional pharmacist visits,[42] one-on-one education via the Pharmacy Resolutions Help Desk,[43] as well as targeted follow-up with pharmacies that are the subject of complaints.[44] Defendants also point to their Exhibit 1,[45] which

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email subscription service, as footer on fax blasts, during regional pharmacist visits, and Texas Pharmacy Association and Texas State Board of Pharmacy's web postings. TMHP, Medicaid's prover enrollment vendor, also offers a pharmacy-specific computer-based training on durable medical equipment and supplies (DME)."

[40] "DSHS' website includes information on the scope of THSteps benefits, online education modules, which are offered free to prescribers, pharmacists, and their respective staff, and links to other provider and client resources, including VDP and relevant excerpts of TMHP's online Medicaid Provider Procedure Manual."

[41] Email notifies [sic] are "utilize[d] to circulate relevant news, policy clarifications, and updates, such as changes to the Medicaid Preferred Drug List (PDL), changes of prior authorization and/or claims processing vendor, and implementation of new processes such as coordination of benefits or addition of limited home health supplies to Medicaid formulary."

[42] Regional pharmacists employed by Medicaid "make regular visits to each Medicaid-enrolled pharmacy and are available by phone for questions or concerns as they arise."

[43] "VDP's Pharmacy Resolution Help Desk phone line staff provides oral assistance to pharmacy providers with questions or problems relating to claims submission, program policy, and procedures."

[44] "When the state becomes aware of issues and/or complaints about a particular pharmacy, regional field staff reaches out to specific pharmacies via phone or in-person visit to orally address any identified issue/complaint or to offer programmatic guidance to Medicaid pharmacies."

[45] Dkt. 998-1.

contains excerpts from Quarterly Monitoring Reports filed with the court, as support for their contention that they have satisfied all of the requirements of the CAO.[46] Finally, Defendants point to the Declaration of Loretta Disney, who is a Regional Pharmacy Manager for the Texas Health and Human Services Commission.[47] Ms. Disney explains that Regional Pharmacists "target certain pharmacies that are the subject of complaints brought to [them] by pharmacies, prescribers, or members."[48] The court agrees with Defendants that they have satisfied the requirements of this paragraph of CAO 637-8.

The second paragraph of the CAO at issue requires that "Defendants . . . train staff at their ombudsman's office about the emergency prescription standards, what steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines, and DME standards and common problems." In support of their contention that they have complied with the CAO, Defendants point to the Declaration of Laura Bagheri, a Program Specialist V in the Medicaid/CHIP Office of the Medical Director, which explains that Ms. Bagheri "conducted the first training session of the Ombudsman staff required by the CAO in September 2007." She states that the "training included information on

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[46] Dkt. 998-1.

[47] Dkt. 998-11.

[48] Dkt. 998-11 ¶¶ 9-11.

the 72-hour emergency prescription standards, what steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines, and DME standards and common problems." Next, Defendants rely on the Declaration of Ms. Castoreno, who describes the actions Defendants have taken in addition to the one time training required to be completed by January 2008. She explains that she provided additional training to the Ombudsman's Office on February 6, 2008, August 19, 2009, and January 11, 2013. Finally, the Defendants put forth the Declaration of Dawn Rehbein.[49] Ms. Rehbein explains that "on at least four occasions since fall of 2007 Vendor Drug Program ("VDP") staff have provided face-to-face training to Ombudsman staff." The court agrees with Defendants that they have satisfied the requirements of this paragraph of CAO 637-8.

Plaintiffs contend that even if the court holds that Defendants have taken these specific actions, that Defendants have been ineffective and more must be done to attain the objectives of the Decree. Generally, the Decree "speaks to the broader goals of enhancing recipients' access to health care and improving the use of health care services by Texas EPSDT recipients."[50] Plaintiffs point to paragraphs 2 and 190 to support their argument. Paragraph 2

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[49] Dkt. 998-10.

[50] *Frazar v. Ladd*, 457 F.3d 432, 439 (5th Cir.2006).

states "Recipients are also entitled to all needed follow up health care services that are permitted by federal Medicaid law. 42 U.S.C. § 1396d(r)."[51] Paragraph 190, which is located in the section of the Decree relating to "Recipients in Managed Care," reads "EPSDT recipients served by managed care organizations are entitled to timely receipt of the full range of EPSDT services, including but not limited to medical and dental checkups."[52]

Any state program of this size and complexity is not going to operate error-free. Defendants have demonstrated that they have substantially complied with the terms of CAO 637-8 and Decree paragraphs 124-130. The parties engaged in difficult negotiations to arrive at the terms of the CAO, and this court approved the terms as fair, reasonable, and adequate. The court cannot determine satisfaction of the Decree or CAOs "by reference to what either party hoped to achieve by the decree, or to what they might have achieved through the litigation."[53] The terms of the Decree and CAO can only be enforced as written.

IV. CONCLUSION

Paragraphs 124-130 of the Consent Decree and CAO 637-8 have been satisfied and no further action

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[51] Dkt. 135.

[52] *Id.*

[53] *Frew v. Gilbert*, 109 F.Supp.2d 579, 594 (E.D.Tex.2000) (internal quotation marks omitted).

is required by Defendants. The remaining provisions of the Decree and the CAOs continue in force and are unmodified by this order.

IT IS SO ORDERED.

SIGNED this the 18th day of December, 2013.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-40048

CARLA FREW; CHARLOTTE GARVIN, as next friend of her minor children Johnny Martinez, Brooklyn Garvin and BreAnna Garvin; CLASS MEMBERS; NICOLE CARROLL, Class Representative,

Plaintiffs-Appellants

v.

KYLE JANEK, Commissioner of the Texas Health and Human Services Commission in his official capacity; KAY GHAHREMANI, State Medicaid Director of the Texas Health and Human Services Commission in her official capacity,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas, Paris

ON PETITION FOR REHEARING EN BANC

(Filed Jul. 14, 2015)

(Opinion ___, 5 Cir., ___, ___ F.3d ___)

Before JOLLY, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 36), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Wiener, Jr.
UNITED STATES
CIRCUIT JUDGE

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* Judge Smith did not participate in the consideration of the rehearing en banc.

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

LINDA FREW, et al., Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 3:93cv65
	§	SENIOR JUDGE
ALBERT HAWKINS, et al.,	§	WILLIAM WAYNE JUSTICE
Defendants.	§	

CORRECTIVE ACTION ORDER: PRESCRIPTION AND NON-PRESCRIPTION MEDICATIONS; MEDICAL EQUIPMENT AND SUPPLIES

Decree References:

¶ 3: "Recipients are also entitled to all needed follow up health care services that are permitted by federal Medicaid law. 42 U.S.C. §1396d(r).

¶129: " . . . Defendants will implement an initiative to effectively inform pharmacists about EPSDT, and in particular about EPSDT's coverage of items found in pharmacies . . . "

¶130: " . . . if pharmacists' understanding of the program is unacceptable, Defendants will conduct an initiative to orally inform pharmacists about EPSDT's coverage."

Defendants have implemented a Preferred Drug List (PDL), as permitted by federal Medicaid law. 42 U.S.C. §1396r-8. Prior authorization is required if a

class member is to receive a prescribed medicine that is not on the PDL. Defendants' rules allow pharmacies to provide a 72-hour "emergency" allotment of a prescription. The purpose of the 72-hour "emergency" prescription is to ensure that class members are not deprived of medicine that they need while prior authorization is requested, particularly (but not only) on weekends. Further, the emergency" allotment provides time for a new prescription to be requested if the off-PDL medicine is not approved.

IT IS ORDERED:

•[1] As to class members, Defendants' policy is: a pharmacy must provide a 72-hour emergency allotment of a medication that is not listed on the PDL if a denial is only because of lack of prior authorization and the pharmacist has made a reasonable attempt to contact the physician or, if it is a night, weekend, holiday, or the physician cannot be reached, the pharmacist has submitted the prescription as written and received an electronic denial solely due to lack of a prior authorization ("PA").

•[2] Defendants have an automated system such that seven days a week/24 hours a day (except for the normal weekly scheduled system maintenance, which is about 5 hours/week at night), Medicaid pharmacy providers can submit a point-of-sale claim with an emergency override for any claim that has rejected due solely to lack of a prior authorization. The claim is typically adjudicated immediately and returned with a payable response and amount to be paid to the

provider. Pharmacy providers are paid in full for the quantity submitted on the claim and receive a full dispensing expense. In other words, through the computer system of Defendants' contractor, when pharmacies submit a claim for a medication not listed on the PDL, they may submit a request through the computer system for an "emergency override" to obtain immediate electronic approval of a 72-hour emergency prescription. This is permitted if there is no prior approval to fill the entire non-PDL prescription as written and the physician is unavailable and/or unable to request prior approval.

•[3] Currently, when a pharmacy submits a claim, it receives an electronic message from Defendants' contractor within a matter of seconds. The message either approves payment or explains the reason(s) for denial by use of denial codes. This message includes a maximum of 200 characters (letters, punctuation, spaces). Within 120 days, Defendants will ensure that this message is changed as follows. When a non-PDL medication is denied solely because prior authorization has not been obtained, the message will instruct the pharmacy to the effect that the Dr. should call TX PA Call Center 1-877-728-3927 or R.Ph should submit 72hr Emergency Rx if Dr. not available. No later than three months after entry of this Order, Defendants will send a mailing to all pharmacies enrolled in Medicaid. The mailing will explain in clear terms the 72-hour emergency prescription policy, with emphasis on the requirement as it applies to children. It will also include useful information about the

requirement, in a format and size that can be attached to pharmacy computer screens, to remind pharmacy staff about the requirement.

•[4] No later than three months after entry of this Order, Defendants will work with the Texas Pharmacy Association to explain to TPA members the 72-hour emergency prescription policy, with emphasis on the policy as it applies to children.

•[5] No later than six months after entry of this Order, Defendants will begin an analysis of their contracted pharmacies' claims history for emergency prescriptions. Within 12 months of the beginning of this analysis, Defendants will complete their analysis of all pharmacies enrolled in Medicaid. At their option, Defendants may rely on their Vendor Drug staff to complete the two analyses required in this paragraph. Initially, they will seek to identify those pharmacies that, despite processing a significant volume of Medicaid prescriptions in therapeutic classes subject to prior authorization, have processed no emergency prescriptions pursuant to the 72-hour policy. They will subsequently seek to identify those Medicaid pharmacies that fill a high volume of Medicaid prescriptions in therapeutic classes subject to prior authorization but that appear to have filled a lower than expected percentage of 72-hour prescriptions. Within two years of completion of the first analysis, Defendants will begin a second analysis for all pharmacies. The second analysis will be finished within 12 months. At their option, Defendants may choose to prioritize their analysis in any reasonable manner.

•[6] Defendants will provide intensive, targeted educational efforts to those pharmacies for which the data suggest a lack of knowledge of the 72-hour emergency prescriptions policy. In addition, Defendants will continue their educational efforts with respect to all Medicaid pharmacies, using means such as newsletters, fax notices to stakeholders, computer-based training, information on their public website, e-mail notifications, regional pharmacist visits, one-on-one education via the Pharmacy Resolutions Help Desk, as well as targeted follow-up with pharmacies that are the subject of complaints.

•[7] Defendants will make available a Medicaid PDL subscription service, at no charge, that health care providers may use on the internet or download to hand held devices that they use at the point of care. The service will inform prescribers about all non-preferred medicines that require prior approval. Defendants will post information on their Vendor Drug website advising providers about the service and how to request it. Defendants expect that the service will be available by August 2007.

•[8] Beginning no later than January 2008, Defendants will begin encouraging all Medicaid-enrolled pharmacies to also become Medicaid-enrolled providers of durable medical equipment ("DME"). The purpose of this effort is to facilitate class members' receipt of DME normally found in pharmacies.

•[9] Beginning in September 2007, each time a pharmacy signs a new contract, amended contract or

renewed contract to be a Medicaid pharmacy, Defendants will provide information about the emergency prescription policies. They will also provide information about the scope of DME that is available in pharmacies for class members.

•[10] By January 2008, Defendants will train staff at their ombudsman's office about the emergency prescription standards, what steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines, and DME standards and common problems.

•[11] Beginning no later than their September 2007 contract amendments, Defendants will – encourage STAR managed care organizations to train staff at their 24-hour nurse hotlines about the emergency prescription standards, what steps to take to immediately address class members' problems when pharmacies do not provide emergency medicines, and DME standards and common problems. The 24-hour nurse hotlines will attempt to respond immediately to problems with emergency medicines by means at their disposal, including explaining the rules to class members so that they understand their rights and, if need be, by offering to contact the pharmacy that is refusing to fill the prescription to explain the 72-hour and DME policies to the staff refusing to fill the prescription.

•[12] When the two analyses are complete, counsel will confer to determine what, if any, further action is required. Counsel will begin to confer no later than

30 days following completion of the second analysis. ("completion"). If the parties agree, they will so report to the Court within 120 days of completion. If the parties cannot agree within 90 days of completion, the dispute will be resolved by the Court upon motion to be filed by either party. If the parties cannot agree, either party will file their motion within 30 days of the conclusion of discussions among counsel.

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

LINDA FREW, et al.	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 3:93cv65
ALBERT HAWKINS, et al.	§	
	§	
Defendants.	§	

CONSENT DECREE

* * *

INTRODUCTION

1. According to the 1990 United States Census, about 5,672,537 Texans are under the age of 21. Roughly 1.5 million of them (more than 20%) receive Medicaid and are eligible for Early Periodic Screening, Diagnosis and Treatment (EPSDT) benefits. The number of recipients should increase in future years because of federally required eligibility expansions.

2. EPSDT is intended to provide comprehensive, timely and cost effective health services to indigent children and teenagers who qualify for Medicaid benefits. Check ups are the cornerstone of the program. They assess recipients' health, provide preventive care and counselling (anticipatory guidance) and make referrals for other needed diagnosis and treatment. 42 U.S.C. §§ 1396a(a)(43); 1396d(r). Recipients

are entitled to both medical and dental check ups on a regular schedule. About 48% of recipients received at least one medical check up in fiscal year 1994 (FY94), according to reports Defendants filed with the United States Department of Health and Human Services.

3. Recipients are also entitled to all needed follow up health care services that are permitted by federal Medicaid law. 42 U.S.C. § 1396d(r).

* * *

6. To address the parties' concerns, to enhance recipients' access to health care, and to foster the improved use of health care services by Texas EPSDT recipients, the parties agree and the Court orders Defendants to implement the following changes and procedures for the Texas EPSDT program:

* * *

124. *Training for Pharmacists* Pharmacies play a vital role in the EPSDT program. They supply needed pharmaceuticals and medical supplies to recipients based upon prescriptions.

125. Plaintiffs contend that many pharmacists do not understand the broad range of products that EPSDT covers. For example, EPSDT covers over-the-counter medications if physicians prescribe them. Over-the-counter medications are sometimes the medication of choice. For example, benadryl used to be available only by prescription but now is available

over-the-counter. It is often the medication of choice for allergies.

126. EPSDT also covers formula and diapers when medically necessary. Further, the program covers other supplies and equipment that are commonly sold in pharmacies.

127. Plaintiffs contend that when pharmacists do not understand EPSDT's broad coverage, they sometimes refuse to provide needed items to EPSDT recipients absent cash payment. Since many recipients cannot afford to make payment, they go without needed products. Others pay for products that EPSDT actually covers.

128. Defendants do not agree with the facts described by Plaintiffs.

129. By January 31, 1996, Defendants will implement an initiative to effectively inform pharmacists about EPSDT, and in particular about EPSDT' s coverage of items found in pharmacies. The effort will include presentations at meetings of the Texas Pharmaceutical Association and other appropriate organizations, if possible, articles in the TPA newsletter, if possible, and at least one mail out to all pharmacists who participate in the Medicaid program. The mail out will be designed to attract pharmacists' attention, explain EPSDT coverage clearly and encourage pharmacists to provide the full gamut of covered pharmaceutical products to recipients as needed.

130. By July 31, 1996, Defendants will conduct a professional and valid evaluation of pharmacists' knowledge of EPSDT coverage of items commonly found in pharmacies. They will report the results of the evaluation to Plaintiffs by September 1, 1996. If the parties agree that pharmacists' understanding of the program is acceptable, Defendants will continue the initiative described above to inform pharmacists about EPSDT. If the parties do not agree, or if pharmacists' understanding is unacceptable, Defendants will conduct an initiative to orally inform pharmacists about EPSDT's coverage. Plaintiffs will not unreasonably disagree about whether pharmacists' understanding is acceptable.

* * *

190. EPSDT recipients served by managed care organizations are entitled to timely receipt of the full range of EPSDT services, including but not limited to medical and dental check ups.

* * *

MISCELLANEOUS

300. Defendants may contract with individuals and entities to provide EPSDT services. But, Defendants remain ultimately responsible for the administration of the EPSDT program in Texas and compliance with federal EPSDT law.

* * *

Done February 16th 1996 at Tyler, Texas.

/s/ Wm. Wayne Justice
UNITED STATES
DISTRICT JUDGE