IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JEANINE B., BY HER NEXT FRIEND
ROBERT BLONDIS, et al.,

Plaintiffs,

v. Case No. 2:93-CV-000547

TONY EVERS, et al.,

Defendants.

JOINT MOTION TO TERMINATE SETTLEMENT AGREEMENT AND CONSENT DECREE ON GROUNDS OF SUBSTANTIAL COMPLIANCE

NOW COME Plaintiffs and Defendants, by and through their undersigned counsel, and hereby move this Court for an Order pursuant to Fed. R. Civ. P. 60(b)(5) terminating the modified settlement agreement entered into by the parties and approved by the Court in a consent decree entered on December 2, 2002 (Dkt. 509), as modified and approved by the Court on November 14, 2003, and May 31, 2012 (Dkts. 517, 569). A Joint Brief of the parties is submitted herewith, with other materials in support of this motion to be filed pursuant to a schedule ordered by the Court.

Dated: February 3, 2021

Respectfully submitted,

FOR PLAINTIFFS:

s/Eric E. Thompson
ERIC E. THOMPSON
Mass. BBO #565100

Children's Rights
88 Pine Street, Suite 800
New York, New York 10005
(917) 533-1161
(212) 683-4015 (Fax)
ethompson@childrensrights.org

FOR DEFENDANTS:

JOSHUA L. KAUL
Attorney General of Wisconsin

s/Rebecca Paulson
REBECCA PAULSON
Assistant Attorney General
State Bar # 1079833

s/Jennifer R. Remington
JENNIFER R. REMINGTON
Assistant Attorney General
State Bar # 1098838

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0278 (Paulson)
paulsonra@doj.state.wi.us
(608) 267-2230 (Remington)
remingtonjr@doj.state.wi.us
(608) 267-8906 (Fax)

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BRIEF IN SUPPORT OF JOINT MOTION TO TERMINATE SETTLEMENT AGREEMENT AND CONSENT DECREE ON THE BASIS OF SUBSTANTIAL COMPLIANCE

Plaintiff class ("Plaintiffs"), by their undersigned counsel, and Defendants Wisconsin Governor Tony Evers and the Wisconsin Department of Children and Families (collectively, "State Defendants" or "Defendants"), by their undersigned counsel, jointly submit this brief in support of their Joint Motion to Terminate Consent Decree on the Basis of Substantial Compliance ("Joint Motion").

FACTUAL AND PROCEDURAL BACKGROUND

I. *Jeanine B.* Lawsuit.

On June 1, 1993, the American Civil Liberties Union Children's Rights Project (now Children's Rights) and co-counsel initiated a class action lawsuit against the Governor of Wisconsin, the Secretary of the Wisconsin Department of Health and

Social Services ("Department")[1], the Milwaukee County Executive, and the Director of the Milwaukee County Human Services Division seeking declaratory and injunctive relief based on alleged system-wide deficiencies in the Milwaukee County child welfare system. (Dkt. 1.) Plaintiffs were a class of an estimated 5,000 children of various ages who were receiving child welfare services in Milwaukee County. (Dkt. 1; Compl. ¶¶ 21, 58-217.) The Plaintiff representatives came into the system based on a variety of home conditions, including allegations of physical and sexual abuse and untreated mental health conditions and special needs. Many of the named Plaintiffs had been in foster care for years, including some who had been placed there prior to the age of one. (*Id.*) Various attorneys, social workers, and community members reported issues with the conditions these children experienced in foster care or during visitation with their family members that went unresolved. (*Id.*)

The deficiencies alleged in the Complaint included the failure to properly investigate suspected abuse and neglect, the provision of inappropriate or unsupervised placements, the assignment of up to one hundred families per case worker, the failure to properly train and supervise those caseworkers, and the general underfunding of the child welfare system. (Compl. ¶ 2.) The class alleged that Defendants were violating the state and federal constitutions, the Americans with Disabilities Act, the federal Child Abuse Prevention and Treatment Act, and other

[1] This Department subsequently was renamed the Wisconsin Department of Health and Family Services ("DHFS"). In 2008, the Wisconsin Department of Children and Families ("DCF") was formed from consolidation of parts of DHFS, including responsibility for providing child welfare services in Milwaukee County, and parts of the Wisconsin Department of Workforce Development.

state and federal laws by operating the child welfare system in this manner. (Compl. ¶¶ 260-264.)

In 1998, the Wisconsin Legislature enacted legislation by which the State of Wisconsin ("State") took over direct responsibility for administering and funding Milwaukee County's child welfare services. *See* 1997 Act 27; Wis. Stat. § 48.48(17). This is a statutory change that will not be affected by the outcome of the Joint Motion. Following this change, the litigation continued only against the State Defendants.

Plaintiffs filed a Supplemental Complaint and Amended Supplemental Complaint in 1999 and 2001, respectively, alleging continuing violations of law in the child welfare system in Milwaukee County. (Dkts. 274, 382.) During this time period, the State Defendants worked toward implementing a number of reforms through the Bureau of Milwaukee Child Welfare ("BMCW"),[2] and as a result Plaintiffs and the State Defendants entered into successful settlement discussions and executed a settlement agreement in 2002.

II. Settlement Agreement and Modifications to Settlement Agreement.

On December 2, 2002, the Court approved the settlement agreement ("Settlement Agreement") in a consent decree ("Consent Decree") that required Defendants to meet certain benchmarks and criteria, such as caseload management for social workers and safety from maltreatment, as well as other specific requirements pertaining to the five named plaintiffs. (Dkt. 509.) Most benchmarks

[2]BMCW was created following the 1998 legislation.

are formulated pursuant to a three-year annual period phase in structure. Once Defendants met or exceeded those agreed-upon benchmarks at the Period 3 level for two consecutive six-month periods, the benchmark was no longer subject to enforcement.[3]

For example, the Settlement Agreement required that adoption be finalized for at least 30% of children within two years of entry into care (I.B.7, Period 3), that no more than 0.6% of children in BMCW custody experience substantiated abuse or neglect allegations by a foster parent or staff of a licensed facility (I.C.1, Period 3), and that at least 90% of reports referred for independent investigation be assigned within three business days of that agency's receipt of the referral from BMCW (I.C.3, Period 3). These terms were agreed upon to ensure that children in BMCW's care were safe, regularly monitored, and that steps were taken toward either reuniting the children with their families when appropriate or toward the termination of parental rights and adoption when reunification was not appropriate.

The Settlement Agreement has been modified several times, with the most recent version approved by the Court on May 31, 2012 (Dkt. 568-569).

[3] Although no longer subject to enforcement, Defendants have continued to report to the Milwaukee Child Welfare Partnership Council and to the public their performance in these areas as part of their commitment to transparency. *See, e.g.*, Settlement Agreement reports included on the Partnership Council agendas and related materials available free of charge at https://dcf.wisconsin.gov/mcps/partnership-council. See also Settlement Agreement information and reports available free of charge at https://dcf.wisconsin.gov/mcps/settlement.

In an October 2015 DCF restructuring, BMCW was elevated to division status and became DCF's Division of Milwaukee Child Protective Services ("DMCPS"). For readability, the DMCPS acronym is used in the remainder of this brief regardless of actual DCF structure at the referenced time.

Defendants have been released from 18 of the 19 benchmarks established in the Settlement Agreement, as well as the named plaintiff requirements.[4] Briefly, the benchmarks from which Defendants have been released are:

I.B.1. Good faith negotiation by the parties with the Milwaukee County District Attorney to ensure adequate legal representation for the prosecution of Termination of Parental Rights ("TPR") petitions, consistent with Adoption and Safe Families Act ("ASFA") requirements.

I.B.2. Percentage of children reaching 15 of the last 22 months in out-of-home care for which a TPR petition has been filed or an allowable ASFA exception has been documented in their case by the end of the fifteenth month in out-of-home care (Period 3 standard was greater than or equal to 90%).

I.B.3. Percentage of children in DMCPS custody for more than 15 of the last 22 months in out-of-home care without a TPR previously filed or an available ASFA exception previously documented shall have had a TPR petition filed or an ASFA exception documented (Period 3 standard was greater than or equal to 90%).

I.B.4. Percentage of children in DMCPS out-of-home care for more than 24 months, calculated against a baseline of 5,533 children in DMCPS out-of-home care (Period 3 standard was less than or equal to 25%).[5]

I.B.6. Percentage of children who are reunified with parents or caretakers at the time of discharge who are reunified within 12

[4]Provisions for which the Settlement Agreement included two alternative benchmarks are counted only once.

[5]Benchmark I.B.5. was an alternative to I.B.4.

months of entry into out-of-home care (Period 3 standard was greater than or equal to 71%).

I.B.7. Percentage of adoptions finalized within 24 months of entry into out-of-home care (Period 3 standard was greater than or equal to 30%).

I.C.1. Percentage of children in DMCPS custody for whom there are substantiated abuse or neglect allegations by a foster parent or staff of a facility required to be licensed (Period 3 standard was less than or equal to 0.60%).

I.C.2. Percentage of reports of alleged abuse or neglect referred to the independent investigation agency within three business days (Period 3 standard was equal to or greater than 90%).

I.C.3. Percentage of reports of alleged abuse or neglect referred for independent investigation assigned to an independent investigator within three business days of the independent investigation agency's receipt of the referral from DMCPS (Period 4 standard was greater than or equal to 90%).

I.C.4. Percentage of independent investigation determinations within 60 days of the independent investigation agency's receipt of the referral (Period 3 standard was greater than or equal to 90%).

I.D.1.-2. Effective January 1, 2002, ongoing case managers shall have average caseloads for each case management site of not more than 11 families per case-carrying manager (with phase-in provisions in I.D.2.).

I.D.3.-4. By January 1, 2002, DMCPS meets 90% compliance with monthly face-to-face visits with children in DMCPS custody.

I.D.5. Use of shelter placements will be phased out entirely.

I.D.6. By December 31, 2003, and thereafter, no child shall be placed in a shelter.

I.D.7. By December 31, 2003, DMCPS developed Special Diagnostic Assessment Centers for children, and placement in such centers follows applicable law.

I.D.8. DCF will make its best efforts to seek legislative approval of foster parent reimbursement rates consistent with UDSA standards.

Only one benchmark remains, numbered § I.D.9 in the Settlement Agreement. That provision provides:

> At least the following percentages of children in [DMCPS] custody within the period shall have had three or fewer placements during the previous 36 calendar months of their current episode in [DMCPS] custody. The number of placements will exclude time-limited respite care placements and returns to the same caregiver after an intervening placement during the same out-of-home care episode. Those children in [DMCPS] custody through the Wraparound Milwaukee program shall be excluded from this calculation. Initial assessment center placements also will be excluded from the calculation.

The Period 3 percentage is set at greater than or equal to 90%, as settled upon by the parties. (Dkt. 509.)

Since 2010, the annual performance for this metric has met or exceeded 80% each year. *See* January-June 2020 Semi-annual Settlement Report at https://dcf.wisconsin.gov/mcps/partnership-council. Since 2013, annual performance for this metric has met or exceeded 87% in each year, reaching a high of 89.2% placement stability in year 2019. (*Id.*)

The number of children in foster care in Milwaukee County has fallen dramatically over the years, with an increased number of permanent placements (such as adoptions). The children who do remain in care often present complex and challenging issues. Additionally, there has been a pronounced policy shift in recent years in favor of protecting children in their homes with their parents and providing greater access to resources rather than placing them with others through the child welfare system. The most evident indicator of this paradigm shift is the passage of

the Family First Prevention Services Act ("Family First"), which reforms Title IV-E and Title IV-B of the Social Security Act by allowing reimbursement for mental health services, substance abuse treatment, and in-home parenting skills training, among other services, in an effort to reduce the placement of children in group homes and other congregate care facilities and instead keep families together where possible. Public Law No. 115-123. These changes must be implemented by DCF and other similar agencies across the country; DCF has obtained a waiver allowing implementation by October 2021. These changes also contribute to the dwindling number of children in out-of-home care.

Stability in placements continues to be Defendants' goal, and the Settlement Agreement benchmark results reflect their continued efforts to provide constancy wherever possible even as the paradigm shift away from foster care has gained momentum. The parties agree that the time has come to recognize that the reforms Defendants have achieved are sufficient to meet substantial compliance and for this Court to terminate the Settlement Agreement and Consent Decree.

DISCUSSION

I. Standard of Review and Applicable Law.

Rule 60(b)(5) of the Federal Rules of Civil Procedure provides that "upon motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" if "applying [the judgment] prospectively is no longer equitable." This rule serves "a particularly important function in what [courts] have termed 'institutional reform litigation.'" *Horne v. Flores*, 557 U.S. 433, 447

(2009) (citing *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 380 (1992)). As the *Flores* Court observed, "the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." *Flores*, 557 U.S. at 448.

When seeking relief under Rule 60(b)(5), the "party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion when it refuses to modify an injunction or consent decree in light of such changes." *Id.* at 447 (citations omitted). A party seeking a change can meet the initial burden of establishing a significant change in circumstances either by showing that the factual conditions have significantly changed or by pointing to a significant change in the law. *Balderas v. Thorgaard*, 162 F.R.D. 130, 132-133 (E.D. Wis. 1995) (consent decree modified to no longer require notification to municipal court defendants by certified mail due to increased cost and lack of effectiveness). When considering whether factual circumstances merit a change, modification may be warranted when: 1) changes make compliance substantially more onerous; 2) a decree proves unworkable because of unforeseen obstacles; or 3) enforcement of the decree without modification would be detrimental to the public interest. *Id.* (citing *Rufo*, 502 U.S. at 383). Courts "must take a flexible approach to Rule 60(b)(5) motions addressing such decrees." *Flores*, 557 U.S. at 450 (internal quotation marks and citation omitted).

While the party seeking relief bears the initial burden of establishing changed circumstances warranting that relief, "once a party carries this burden, a court abuses its discretion when it refuses to modify an injunction or consent decree in light of such changes." *Id.* at 447 (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997)) (internal quotation marks omitted). The Court's inquiry is "whether a significant change either in factual conditions or in law renders continued enforcement of the judgment detrimental to the public interest." *Flores*, 557 U.S. at 453 (quoting *Rufo*, 502 U.S. at 384) (internal quotation marks omitted). Courts within this circuit have applied the standard in *Flores* to find sufficient grounds for prospective relief based on either a change in factual circumstances or a change in law. *See Reed v. Minott*, No. 1:85-cv-1353-wtl-dkl, 2014 WL 5798618 at *2 (S.D. Ind. Nov. 7, 2014) (passage of Affordable Care Act changed law related to eligibility requirements for Medicaid such that injunction must be vacated).

Here, the parties agree that Defendants have substantially complied with the Consent Decree and the objectives of the Settlement Agreement have been met.

II. Defendants have Substantially Complied with the Consent Decree.

Defendants have demonstrated for almost two decades their serious commitment to satisfying all requirements of the Settlement Agreement including the placement stability provision, substantially changing the child welfare system responsible for Plaintiff children's safety and well-being. Following takeover by the State of Milwaukee County's child welfare system and the settlement of this case by the Parties, Defendants initiated numerous systemic changes to the administration

of child welfare in Milwaukee County aimed at ameliorating the problems raised by the lawsuit and permanently reforming the child welfare system so that similar issues would not arise in the future. Defendants long have been released from all but one of the nineteen agreed-upon benchmark in the Settlement Agreement. Defendants have demonstrated compliance with these standards (and continue to publish and publicly report on the results, even though the standards are no longer enforceable on them under the Settlement Agreement) over a sustained period of many years. In fact, the last remaining benchmark–the 90% placement stability benchmark–has been the last remaining benchmark since 2013. Defendants were released from all other obligations as of the end of year 2012, when Defendants were released from enforcement of § I.B.6. All of the other benchmarks were previously achieved, and the majority were achieved by the end of 2006, nearly fifteen years ago. *See* January – June 2020 Semi-annual Settlement Agreement Report at https://dcf.wisconsin.gov/mcps/partnership.council. In short, Defendants' actions since first signing the Settlement Agreement and entering the consent decree reflect a positive, proactive, and sustained effort to successfully reform the child welfare system in Milwaukee County. *Contrast Shakman v. Clerk of Cook Cty.*, No. 69C2145, 2020 WL 1904904 at *17 (N.D. Ill. Apr. 17, 2020) (termination of decree not warranted where only limited steps toward compliance were taken on the eve of Rule 60 motion and Defendants "showed a general disregard for certain aspects" of the orders' requirements).

As for the last enforceable provision, Defendants have been at or above 87% placement stability every year since 2013. *See* January – June 2020 Semi-annual Settlement Report at https://dcf.wisconsin.gov/files/mcps/partnership/pc-semi-annual-settlement-agreement-rpt-2020.pdf, page 6. While Defendants have not hit the 90% Period 3 goal set out in the Settlement Agreement, they have substantially complied with the requirement to do so as evinced by numbers consistently near that figure. The parties agree that Defendants' performance over time demonstrates that, in the context of this action, they have substantially complied with the last remaining provision, and this Court should therefore release Defendants from strict compliance with this last provision.

III. The Objectives of the Settlement Agreement have been Accomplished.

Alternatively, this Court should terminate the Consent Decree because the objectives underlying the Settlement Agreement have been accomplished. *See Mendoza v. City of New Orleans*, No. Civ. A. 98-2868, 1999 WL 569532 at *3 (E.D. La. Aug. 3, 1999) (Consent decree terminated for substantial compliance where City's police department had complied with and been released from all but one provision over 12 years and had met the goals at the heart of the consent decree). The "flexible standard" to be applied to Rule 60(b)(5) motions requires the moving party to show that a durable remedy has been implemented. *Cf. LaShawn A. ex rel. Moore v. Fenty*, 701 F. Supp. 2d 84, 111 (D.D.C. 2010) (court does not have confidence that child welfare system changes are durable or self-sustaining).

The sole remaining benchmark in the Settlement Agreement for which the Period 3 standard has not been met is the placement stability statistic. This Settlement Agreement benchmark was agreed to by the parties as part of the larger goal of reforming the child welfare system in Milwaukee County and ensuring that children who find themselves in that system are provided with necessary resources and care. The parties agree that in the context of this case, those objectives have been substantially satisfied and continue to be a top priority for Defendants looking forward.

Defendants have made long-term strides to accomplish the objectives of the Settlement Agreement. Substantiated maltreatment of children in care has plummeted. Medical care, dental care, and other services have improved substantially. Children who interact with Milwaukee's child welfare system are now offered a panoply of services not previously available to them. Worker case load ratios have stabilized, allowing regular interactions between social workers and children that lay the groundwork for either adoption or reunification with family members, as appropriate. Defendants have a demonstrated record of prolonged reform and a commitment to continuing compliance with the various metrics in the Settlement Agreement, even years after those numbers became unenforceable. While no system is perfect, Defendants have achieved significant, sustainable gains that go far beyond the numbers on the pages of their periodic reports.

The only remaining number Defendants have not achieved is the 90% placement stability number. Defendants have consistently held that number between

87 and 89% annually for the last several years and have thus been in substantial compliance with it for an extended period. *Contrast LaShawn A*, 701 F. Supp. 2d at 111-112 (internal improvements insufficient to show compliance with a multitude of remaining decree requirements).

Moreover, the strong results reported for the semi-annual period January – June 2020, despite the unprecedented challenges presented by the COVID-19 pandemic, demonstrate the maturity, strength, and resilience of the system that has been created by Defendants' commitment to the objectives of the Settlement Agreement. *See* January – June 2020 Semi-annual Settlement Agreement Report at https://dcf.wisconsin.gov/files/mcps/partnership/pc-semi-annual-settlement-agreement-rpt-2020.pdf. The pandemic provided a stress test for the system, and it passed with flying colors.

In addition to the many systemic changes Defendants have made and continued over the last two decades, DCF remains committed to transparency through meaningful public accountability, most notably the continued regular publication of performance monitoring metrics regarding DMCPS operations. As part of that commitment to transparency, DCF intends to continue at least through calendar year 2022 publishing the DMCPS performance monitoring metrics currently shared out at meetings of the Milwaukee Child Welfare Partnership Council, as well as continuing to publish other performance monitoring metrics.

The Partnership Council includes not only interested government agencies and representatives, but a variety of community organizations and representatives of the

Milwaukee community that have a vested interest in the continuing development of positive change and reform within the Milwaukee child welfare system. *See* https://dcf.wisconsin.gov/files/mcps/partnership/2020pc/pc-membership-july-2020.pdf. They act for groups that come into frequent contact with the child welfare system and have educational backgrounds and experience in relevant areas such as medicine, social work, and education. Partnership Council meetings are publicly noticed and well attended. Partnership Council representatives and attendees from the general public frequently raise issues and pose questions for Defendants to consider and address. The Partnership Council will continue its work and oversight regardless of whether the Settlement Agreement remains in place, and DCF remains committed to publishing its results and remaining accountable to the public.

Wisconsin is also subject to Child and Family Services Reviews ("CFSR") conducted by the Children's Bureau of the Administration for Children & Families, U.S. Department of Health and Human Services. The purpose of these rigorous periodic reviews is to ensure conformity with federal child welfare requirements, find out what actually is happening to children and families as they are engaged in child welfare services, and assist states in helping children and families obtain positive outcomes. After a CFSR is completed, a state completes a Performance Improvement Plan ("PIP") to address areas in their child welfare services that need improvement. The federal CFSR/PIP process was just getting underway at the time this case was settled in 2002. This is now a well-established process, with evidence-based benchmarks and ongoing federal oversight.

The parties agree that the objectives of the Settlement Agreement—to improve the safety and well-being of the Plaintiff class of children—have been met, continue to be met, and will continue to be met without further need of court oversight or enforcement.

CONCLUSION

For the foregoing reasons, the parties request that this Court grant the parties' motion and provide the following relief:

1. Approve as to form the accompanying notice to class representatives ("Notice");
2. Provide direction and approve the form of the accompanying proposed scheduling order ("Scheduling Order");
3. Order that the Notice be disseminated as proposed in the Scheduling Order, by a date to be established by the Court;
4. Set this matter for hearing so that any comments or objections to the Joint Motion may be heard and responded to. The parties request that any such hearing be held no later than 60 days from publication date of the Notice and that any written objections to the Joint Motion be filed by 45 days from publication of the Notice.
5. If no objections are received by 60 days from publication date of the Notice, that this Court order the Consent Decree in the above-captioned matter be terminated and this case dismissed with prejudice.

Dated: February 3, 2021.

Respectfully submitted,

FOR PLAINTIFFS:

s/Eric E. Thompson
ERIC E. THOMPSON
Mass. BBO #565100

Children's Rights
88 Pine Street, Suite 800
New York, New York 10005
(917) 533-1161
(212) 683-4015 (Fax)
ethompson@childrensrights.org

FOR DEFENDANTS:

JOSHUA L. KAUL
Attorney General of Wisconsin

s/Rebecca Paulson
REBECCA PAULSON
Assistant Attorney General
State Bar # 1079833

s/Jennifer R. Remington
JENNIFER R. REMINGTON
Assistant Attorney General
State Bar # 1098838

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0278 (Paulson)
paulsonra@doj.state.wi.us
(608) 267-2230 (Remington)
remingtonjr@doj.state.wi.us
(608) 267-8906 (Fax)