

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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Brittany R. Tovar and  
Reid Olson

Court File No. 16-cv-00100 (DWF/LIB)

Plaintiffs,

v.

**FIRST AMENDED COMPLAINT  
AND  
DEMAND FOR JURY TRIAL**

Essentia Health,  
Innovis Health, LLC, dba Essentia Health  
West,  
HealthPartners, Inc., and  
HealthPartners Administrators, Inc.;

Defendants.

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Plaintiffs Brittany R. Tovar and Reid Olson, through their attorneys, Christy L. Hall and Lisa C. Stratton of Gender Justice, 550 Rice Street, St. Paul, Minnesota 55103, for their Complaint against the above-named Defendants, state and allege as follows:

**NATURE OF ACTION**

1. This is an action to secure relief for violations of rights guaranteed by the Patient Protection and Affordable Care Act § 1557, 42 U.S.C. § 18116 (“Section 1557”).
2. Section 1557 of the Affordable Care Act bars sex discrimination, including discrimination based on sex stereotypes, gender expression, or gender identity, in any health program or activity, any part of which receives “Federal financial assistance, including credits, subsidies, or contracts of insurance.” 42 U.S.C. §18116(a).
3. Defendant Essentia Health and Defendant Innovis Health, LLC, dba Essentia Health West (collectively, “Essentia”) discriminated against Plaintiff Reid Olson, a beneficiary of the Essentia Health Employee Medical Plan (“the Plan”), in violation

of Section 1557, by categorically excluding any coverage for “[s]ervices and/or surgery for gender reassignment” in the Plan.

4. Defendant HealthPartners, Inc. and Defendant HealthPartners Administrators, Inc. (collectively “HealthPartners”) discriminated against Plaintiff Brittany R. Tovar and Plaintiff Reid Olson (collectively “Plaintiffs”) in violation of Section 1557 of the Affordable Care Act by serving as the third party administrator for Essentia’s health care plan and enforcing the plan’s categorical exclusion of any “[s]ervices and/or surgery for gender reassignment.”

#### **PARTIES**

5. Plaintiff Brittany R. Tovar (“Tovar”) is a citizen of the United States and a resident of Norman County, Minnesota.
6. Plaintiff Reid Olson (“Olson”) is a citizen of the United States and a resident of Scott County, Minnesota.
7. Defendant Essentia Health is a corporation headquartered at 502 E. Second Street, Duluth, Minnesota, which does business throughout the state of Minnesota, as well as in North Dakota, Wisconsin, and Idaho.
8. Defendant Innovis, LLC, dba Essentia Health West, is, upon information and belief, a wholly-owned subsidiary of Defendant Essentia Health which does business in the state of Minnesota.
9. At all relevant times, Defendant Essentia Health and Defendant Innovis, LLC, dba Essentia Health West (collectively, “Essentia”) received Federal financial assistance such as credits, subsidies, or contracts of insurance within the meaning of Section

1557, 42 §18116(a), because Essentia provides medical services in exchange for payments through Medicaid.

10. Defendant HealthPartners, Inc. is a corporation headquartered at 8170 33rd Ave. S., Bloomington, Minnesota 55425.

11. Defendant HealthPartners Administrators, Inc., is, upon information and belief, a wholly-owned subsidiary of Defendant HealthPartners, Inc. which acts as a third party administrator for employer-funded self-insurance plans.

12. At all relevant times, Defendant HealthPartners, Inc. and Defendant HealthPartners Administrators, Inc. (collectively “HealthPartners”) received federal financial assistance such as credits, subsidies, or contracts of insurance within the meaning of Section 1557, 42 U.S.C. §18116(a), because HealthPartners issues qualified health care plans on MNsure, Minnesota’s state health insurance exchange, and its MNsure plan enrollees are provided with advance payments of premium tax credits and/or cost sharing reductions.

### **JURISDICTION AND VENUE**

13. This Court has original jurisdiction over Plaintiff’s claims arising under Section 1557, 42 U.S.C. § 18116(a).

14. Jurisdiction over these claims is appropriate under 28 U.S.C. § 1331.

15. Venue is proper under 28 U.S.C. § 1391 because the discrimination took place in this district and Defendants are headquartered in and conduct business within this district.

## FACTUAL ALLEGATIONS

16. Plaintiff Brittany R. Tovar was employed by Essentia, a health care provider, from September 24, 2010, until July 29, 2016, first as a registered nurse and then as a family nurse practitioner.
17. Tovar's employee benefits at Essentia included health insurance for her and her family provided through the Essentia Health Employee Medical Plan ("the Plan").
18. Plaintiff Reid Olson ("Olson") is Tovar's son. As Tovar's dependent, he was eligible to receive health care coverage through her family health care plan at Essentia. Olson was a beneficiary of the Plan beginning in October 1, 2014.
19. In November 2014, when Olson was a teenager, he was diagnosed with gender dysphoria, a condition recognized in the Diagnostic and Statistical Manual, fifth edition ("DSM-5"), as arising when an individual's gender identity differs from the gender assigned at birth.<sup>1</sup>
20. In current usage such individuals may be referred to as "transgender," while individuals whose gender identity is aligned with the gender they were assigned at birth may be referred to as "cisgender."
21. According to the DSM-5, the symptoms of gender dysphoria include "clinically significant distress or impairment in social, occupational, or other important areas of functioning."

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<sup>1</sup> Consistent with best respectful practices, this Complaint will refer to Reid Olson with he/him pronouns regardless of the time frame referenced

22. The symptoms of gender dysphoria have been shown to be relieved by social and legal transition to the gender with which the individual identifies, and by medical treatments such as mental health counseling, hormone therapy, and gender reassignment surgery.
23. As a transgender boy, Reid changed his name from the name he was given at birth. He began using he/him pronouns. He also received health care treatment for gender dysphoria. Olson and Tovar sought coverage for this care through the Essentia Health Employee Medical Plan.
24. Essentia provided the Plan on a self-insured basis, meaning that Essentia initially bore the financial risk of any claims.
25. In order to administer the Plan and claims under the Plan, Essentia contracted with HealthPartners to be a third party administrator for the Plan.
26. Essentia did not design the Plan itself. Instead, it looked to HealthPartners to provide options for coverage.
27. The Plan corresponds to an insurance policy offered to employers by HealthPartners and known as Policy No. G008HPC-03.
28. According to Kim Carlin, Essentia's benefits director in 2014 and 2015, the Plan years at issue, HealthPartners created and presented insurance plans to Essentia for it to choose from. When HealthPartners presented plan options, the plans already contained a standard list of exceptions and exclusions.

29. When HealthPartners presented these plans to Essentia, it focused on plan features such as deductibles and coinsurance percentages, not on individual areas of coverage. Specific exclusions were not discussed.
30. All of the plans presented to Essentia for Plan years 2014 and 2015 included a categorical exclusion barring any insurance coverage for “[s]ervices and/or surgery for gender reassignment.”
31. It was HealthPartners’ standard practice at the time to present plans that contain this exclusion to self-insurers. HealthPartners would remove this exclusion only if noticed and specifically requested by an employer.
32. Of the 260 self-insured plans administered by HealthPartners in 2015, only 13 covered gender confirmation surgery. These 13 companies were all large employers in the fields of healthcare, medical devices, retail, and banking.
33. For 2014 and 2015, Essentia selected one of the plans that HealthPartners presented. Like all of these plans, it contained a categorical exclusion barring any insurance coverage for “[s]ervices and/or surgery for gender reassignment,” regardless of medical necessity.
34. Because of the Plan’s categorical exclusion of “[s]ervices and/or surgery for gender reassignment,” Olson was denied insurance coverage for health care that his providers had deemed medically necessary.
35. Beginning in March 2015, Tovar used the pre-authorization and appeal processes outlined under the Plan to seek clarification regarding the enforcement of the exclusion. In her communications to Essentia and HealthPartners, she emphasized

the serious repercussions for Olson if he was not able to access medically necessary care.

36. On March 24, 2015, Tovar officially appealed the Plan's categorical exclusion of gender reassignment treatments. Her letter to HealthPartners and Essentia is attached as Exhibit A.
37. In a response letter dated April 9, 2015, a representative of HealthPartners reaffirmed HealthPartners' intent to enforce the exclusion. The representative stated in the letter that HealthPartners was "not questioning whether these services are medically necessary or appropriate" but was nonetheless enforcing the terms of the Plan.
38. Tovar filed a second appeal on May 9, 2015.
39. On May 27, 2015, HealthPartners internally made the decision to deny Tovar's second appeal.
40. At the request of Kim Carlin, HealthPartners deliberately withheld notice of the denial from Tovar.
41. HealthPartners did not inform Tovar of this denial until on or around June 13, 2015, more than 30 days after she filed her appeal and 2 weeks after the decision was made.
42. In some instances, the denial of insurance coverage under the Plan meant that Tovar incurred costs – initially paying out of pocket for services or medications that were only reimbursed much later– that she would not otherwise have incurred. In other instances, the denial of insurance meant that Olson was unable to access medically necessary care in a timely manner.

43. On April 29, 2015, Tovar's doctor recommended Olson begin taking a drug known as Lupron for his gender dysphoria.
44. Among other things, Lupron is medically indicated for treatment of symptoms associated with dysmenorrhea, or painful menstruation.
45. Lupron is also medically indicated to temporarily suspend menstruation, in individuals diagnosed with gender dysphoria whose menses contribute to their gender dysphoria and mental distress. This was the basis for the recommendation given to Olson.
46. On May 20, 2015, HealthPartners received an internal decision on the Lupron claim.
47. HealthPartners refused to cover Lupron for Olson, despite the recommendation from his medical provider indicating that it was medically necessary, because of the Plan's categorical exclusion of "[s]ervices and/or surgery for gender reassignment."
48. Tovar called HealthPartners on May 22, May 25, and May 26, 2015, and left messages inquiring about the Lupron claim.
49. On May 26, 2015, HealthPartners returned Tovar's calls and informed her that Olson's doctor would need to send in a Prior Authorization Exception Form with the diagnosis in order to process the claim for Lupron.
50. After sending in the Prior Authorization Exception form, HealthPartners called Tovar and provided oral confirmation that the claim was denied. Tovar requested written confirmation.

51. On May 28, 2015, Olson's doctor informed Tovar that HealthPartners had faxed an approval letter for the Lupron. Tovar requested and received a copy of the approval letter from the doctor.
52. On May 29, 2015 Tovar called HealthPartners and received oral confirmation that the request for Lupron had been denied. She requested written confirmation.
53. On June 4 and June 8, 2015, Tovar again left messages with HealthPartners requesting a written decision on the Lupron claim.
54. On June 10, 2015, Tovar called HealthPartners and was told that there was no denial on her insurance records and the Lupron claim was approved. She was also told that Lupron did not required prior authorization.
55. Later the same day, HealthPartners called Tovar back to inform her that the Lupron claim was denied. She requested a written decision letter.
56. HealthPartners did not provide Tovar with an official written denial on the claim for Lupron until June 13, 2015. This was 24 days after the decision was made and 45 days after Lupron was originally recommended.
57. Had the provider indicated that the Lupron was recommended for painful dysmenorrhea rather than gender dysphoria, it would have been covered by the Plan.
58. Tovar was informed that it would cost approximately \$9000 to purchase Lupron for Olson in the absence of coverage under the Plan.
59. Lupron, when taken for gender dysphoria, must be out of a patient's system before they can begin testosterone treatments.

60. Olson was scheduled to begin testosterone treatment later that summer, so approval of the Lupron claim was a time sensitive issue.
61. By the time HealthPartners provided official notice that the claim was denied, it was too late for Olson to begin treatment with Lupron.
62. Because the cost of Lupron was unaffordable for Tovar without coverage and because of HealthPartners' delayed and inconsistent notices, Tovar was unable to obtain Lupron for Olson.
63. Providers also prescribed Androderm, a form of testosterone, to treat Olson for gender dysphoria.
64. As with the recommendation for Lupron, the prescription for Androderm was rejected due to the categorical exclusion in the Plan. Had the Androderm been prescribed for a male patient suffering a condition other than gender dysphoria, it would have been approved.
65. HealthPartners' rejection notice for this claim specifically stated that Androderm was "FOR USE BY MALES ONLY" and that this "Product/Service [Was] Not Covered for Patient Gender," essentially mislabeling Olson as not male.
66. As a result, Tovar was initially forced to pay for Androderm out of pocket, though she was later reimbursed.
67. While Essentia and HealthPartners later agreed to provide Tovar with coverage for Androderm as a one-time exception and reimburse her out of pocket expenses, they kept the categorical exclusion in the Plan through the end of 2015.

68. In December 2015, when Tovar contacted HealthPartners' Member Services regarding pre-authorization for gender reassignment surgery for Olson, she was told that the surgery would not be authorized, due to the Plan's continuing exclusion of "[s]ervices and/or surgery for gender reassignment."
69. Had the requested surgery been recommended by a medical provider for a purpose other than gender reassignment related to gender dysphoria – for instance, a mastectomy for a woman suffering from breast cancer – it would have been covered by the Plan.
70. Tovar and Olson suffered financial and emotional harm due to the Plan's discriminatory exclusion of coverage for medical care needed by Olson.
71. Olson was angry, hurt, and concerned about burdening his family financially. He felt that because transgender people were specifically targeted for this exclusion that his medical needs were less important than those of other people, making him feel like less of a person. He also worried about the impact of the coverage dispute on his mother's employment.
72. Tovar suffered worry, anger, disappointment, and sleepless nights. It was more difficult for her to focus on her work, and she suffered a sharp increase in migraines. Her concerns for Olson led her to cry at work in between patients. She reduced her hours at work because of the stress.
73. After becoming aware of this exclusion through Tovar's appeal, Essentia requested that HealthPartners lift the exclusion for the Plan starting January 1, 2016, and

HealthPartners did so. Tovar maintained coverage for herself and Olson under this new plan through October 31, 2016.

**COUNT I**  
**VIOLATION OF THE AFFORDABLE CARE ACT, § 1557**  
**42 U.S.C. § 18116**

74. Plaintiffs incorporate by reference the preceding paragraphs of the Complaint.
75. HealthPartners, consisting of Defendant HealthPartners, Inc. and Defendant HealthPartners Administrators, Inc., is a “health program or activity, any part of which is receiving Federal financial assistance” as governed by Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), because it issues qualified health care plans on MNsure, Minnesota’s state health insurance exchange, and its MNsure plan enrollees are provided with advance payments of premium tax credits and/or cost sharing reductions.
76. HealthPartners discriminated against Plaintiffs Tovar and Olson in violation of Section 1557 of the Affordable Care Act by designing and serving as the third party administrator for the Essentia Health Employee Medical Plan and enforcing the Plan’s discriminatory exclusion of any “[s]ervices and/or surgery for gender reassignment.”
77. HealthPartners’ violation of Section 1557 caused Tovar and Olson economic harm and emotional distress.

**COUNT II**  
**VIOLATION OF THE AFFORDABLE CARE ACT, § 1557**  
**42 U.S.C. § 18116**

78. Plaintiffs incorporate by reference the preceding paragraphs of the Complaint.

79. Defendant Essentia, consisting of Essentia Health and Defendant Innovis, LLC, dba Essentia Health West, receives Federal financial assistance such as credits, subsidies, or contracts of insurance within the meaning of Section 1557, 42 §18116(a), because Essentia provides medical services in exchange for payments through Medicaid.

80. Essentia discriminated against Plaintiff Olson in violation of Section 1557 of the Affordable Care Act by providing insurance through the Essentia Health Employee Medical Plan that contained a discriminatory exclusion of any “[s]ervices and/or surgery for gender reassignment.”

81. Essentia’s violation of Section 1557 caused Olson economic harm and emotional distress.

**JURY DEMAND**

82. Plaintiffs demand a jury trial on all claims for which a jury trial is available.

**RELIEF REQUESTED**

Plaintiffs respectfully request that this Court enter judgment against the Defendants and award the following relief:

- A. Declare that Defendants’ actions violated Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116.

- B. Order Defendants to take such affirmative steps as may be necessary to restore, as nearly as practicable, Plaintiffs to the position they would have been in but for their discriminatory conduct.
- C. Order Defendants to take affirmative action to prevent the reoccurrence of the discriminatory conduct in the future and to eliminate, to the extent as practicable, the effects of their unlawful practices.
- D. Award Plaintiffs compensatory damages, including emotional distress damages, and other appropriate relief as permitted by law.
- E. Award pre-judgment and post-judgment interest on monetary relief.
- F. Award the costs of bringing this suit, including reasonable attorneys' fees and costs where allowed by law.
- G. Award all other relief to which Plaintiffs may be entitled which the Court deems just and equitable.

Dated: December 15, 2017

Respectfully submitted,

GENDER JUSTICE

By: s/Christy L. Hall

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ATTORNEYS FOR PLAINTIFF

# **Exhibit A**

3/24/2015

To Whom It May Concern:

I am writing this letter to protest the exclusion of "Services and/ or surgery for gender reassignment" listed under Services Not Covered as outlined by "My Essentia HSA Plus Plan" Summary Plan Description.

I find the exclusion of transition-related health care as determined by the Essentia Health Employee Medical Plan, "The Plan", and administration of this policy by HealthPartners Administrators, Inc., the "Plan Manager", a significant health-care barrier for my child, a "Covered Dependent" who meets the Plan's definition of eligible dependent.

My 16-year-old son was born female, yet his gender identity is male. Gender dysphoria, as classified by DSM-V, is characterized by significant and persistent distress between the individual's physical sex and their gender identity. Gender dysphoria can lead to debilitating anxiety and depression, substance abuse, and significantly increased risk of suicide. One survey conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that 41% of transgender people attempted suicide. The suicide rate for the general population at that time was 1.6%. My child is 25 times more likely to attempt suicide than a non-transgender due to his serious medical condition. Can you imagine, as a parent, what that feels like? In addition to the stress that accompanies gender dysphoria, he must also face daily challenges that arise from a culture that stigmatizes people who do not conform to gender norms. As a parent and practitioner, it is my duty to provide him with the best care possible to overcome these terrifying statistics. Evidence has shown that transition- related healthcare for

gender dysphoria, such as hormone therapy and sex reassignment surgery, can be crucial in alleviating this distress by providing congruence between one's gender identity and their physical sex. This medically necessary care can be an effective therapeutic treatment for people with this legitimate medical condition. Policy statements by the American Medical Association, American Psychological Association, American Academy of Family Physician, and The Endocrine Society all support the medical need for transition-related care for some transgender people.

As we navigate the sparse resources available for adolescent transition, I discovered this exclusion which is yet another obstacle in ensuring my child has the best medical treatment for this distressing condition. This exclusion leaves no room for individual medical assessments and appropriate treatment recommendations for transgender people. The Plan readily covers hormone therapy, mastectomies, breast reconstruction and mental health care for other health conditions deemed medically necessary. By having different standards for treating transgender people who have medical needs associated with transition than someone with breast cancer (or any other medical condition) where treatment is warranted, The Plan and The Plan Manager display blatant discrimination against this vulnerable population. Against my son. This is in violation of transgender people's constitutional rights, as outlined by the Equal Protection Clause in the Fourteenth Amendment, and undermines the very integrity of high quality and patient-centered health care that Essentia Health embodies.

The mission statement of Essentia Health is to make a healthy difference in people's lives, yet by excluding coverage for transition-related services, Essentia contributes to the disproportionate health disparities that transgender people face. It's ironic that the health care organization I chose employment with, based on their vision of providing excellent care and

commitment to patient satisfaction, in turn chooses to deny access to health care services for a group of people already struggling with negative life outcomes related to their condition. Where is the justice and stewardship in that?

Lastly, I wish to point out that Essentia Health is an Accountable Care Organization that participates in the Medicare Shared Savings Program and received ACO accreditation from the National Committee for Quality Assurance in 2013. As a program administered by an Executive Agency, the Medicare Shared Savings Program must comply with the nondiscrimination provisions of section 1557 of the Affordable Care Act, which forbids health programs administered by an executive agency from discriminating on the basis of gender identity. This law is aimed to ensure ACOs are committed to reducing health care disparities for underserved populations. It holds health programs accountable to the same performance standards these programs utilize internally to improve quality of care. As a participant in a federal program and recipient of federal reimbursement for shared savings, Essentia Health must comply with federal regulations that prohibit discrimination based on gender identity at the level of benefit administration. By excluding transgender health services benefits among employees and their dependents, Essentia Health is essentially breaking the law.

Until six months ago I was unaware of the plight of the LGTB community, until my son opened my eyes to society's moral failure of ensuring equal access to health care for this marginalized population. My goal is to open Essentia's eyes to an outdated policy exclusion that is both discriminatory and illegal. I request removal of the exclusion clause that denies health insurance coverage for transgender-related services, and inclusion of transgender-related health care.

My son's name is Reid. He is an exceptionally gifted artist, and hopes to become a computer animator. One of my proudest moments is when his fourth grade teacher shared a story at a parent conference. Their class had been discussing current events, and their topic was whether an 80-year-old man in the U.S. who was found out to be a Nazi criminal living decades under a secret identity should be tried for his past war crimes. The class all agreed that such a sweet-looking grandpa should be allowed to live out his remaining years in peace, as he committed no crimes under his alias. Reid stood up and announced that time and appearance do not erase accountability, and that there should be justice for his numerous victims and heinous actions against humanity. One clear voice amidst the collective murmur of general conformity. He is not afraid to stand up for what he knows is right. He gets that from his mother.

Brittany Tovar, Family Nurse Practitioner

Essentia Health Ada