

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar and Reid Olson,

Plaintiffs,

vs.

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

Defendants.

Case No.: 0:16-cv-00100-(DWF/LIB)

**DEFENDANTS ESSENTIA
HEALTH AND INNOVIS HEALTH,
LLC’S MEMORANDUM IN
SUPPORT OF MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, MOTION TO
STAY**

INTRODUCTION

On December 15, 2017, Plaintiff Brittany R. Tovar filed a First Amended Complaint with this Court. In relevant part, this First Amended Complaint renames as defendants Essentia Health and Innovis Health, LLC dba Essentia Health West (collectively referred to as “Essentia”) to this action, adds Reid Olson as a plaintiff, and asserts a Patient Protection and Affordable Care Act § 1557 (“Section 1557”) claim by Olson against Essentia. Olson alleges that Essentia discriminated against him by maintaining an employer-sponsored health plan—under which he formerly was a covered beneficiary—containing exclusion for “[s]ervices and/or surgery for gender reassignment.” This exclusion was removed in January 2016, and Olson’s coverage on the plan ended in October 2016.

Essentia is sensitive to issues involving gender identity in healthcare, as evidenced by the fact its plan eliminated the exclusion in question a full year before required by

then-pending regulations interpreting Section 1557. Nonetheless, Plaintiffs' First Amended Complaint is facially deficient and must be dismissed as to Essentia. The First Amended Complaint fails to state a claim upon which relief can be granted against Essentia because the plain language of Section 1557 does not include discrimination on the basis of "gender identity."

Alternatively, Section 1557 is an ambiguous statute, providing little guidance to plan sponsors, such as Essentia, of their coverage obligations to transgender individuals. The Department of Health and Human Services ("DHHS") eventually provided guidance on Section 1557, purporting to prohibit discrimination on the basis of gender identity. DHHS's own guidance, however, specifically notified recipients of federal funds that the effective date for health plan design changes to eliminate unlawful exclusions related to gender reassignment was January 1, 2017. Essentia exceeded this agency guidance by requesting the elimination of the exclusion on January 1, 2016.

Section 1557 incorporates Title IX—a statute enacted as an exercise of Congress' powers under the Spending Clause—and accordingly requires that recipients have adequate notice of the potential scope of liability. Thus, since DHHS provided this express notice and Essentia fully complied with the same, Essentia cannot be held liable to Olson for violating Section 1557 before the effective date of the applicable regulations. Because the allegations in Plaintiffs' First Amended Complaint relate exclusively to acts occurring in 2015, long before the January 1, 2017 date designated for required changes in health plan design, Essentia respectfully requests this Court dismiss Olson's claim against Essentia pursuant to Fed.R.Civ.P. 12(b)(6).

If this Court does not dismiss Olson's claim, Essentia alternatively requests the Court stay the action, including any and all discovery, in recognition of the nationwide injunction presently in place, enjoining enforcement and application of DHHS regulations purporting to prohibit discrimination on the basis of gender identity under Section 1557. Further, DHHS has indicated the agency is revisiting the regulations in light of the nationwide injunction, placing considerable uncertainty on the final obligations of the parties. Because the First Amended Complaint relies on the very premise now in question that Section 1557 prohibits discrimination based on gender identity, a stay is appropriate and necessary for judicial efficiency and to conserve the parties' and Court's resources awaiting a final decision regarding the lawfulness of the regulations and new regulations by DHHS. Accordingly, Essentia requests this Court grant its motion to stay this case in the event the matter is not dismissed.

FACTUAL BACKGROUND

I. First Amended Complaint Allegations

From September 24, 2010 to July 29, 2016, Tovar was employed by Essentia as a nurse and received health insurance for her and her family provided through the Essentia Health Employee Medical Plan (the "Plan") as part of her employee benefits. (Doc No. 66 at ¶¶ 16-17.) The Plaintiffs allege this Plan corresponded to an insurance policy offered to employers by Defendants HealthPartners, Inc. and HealthPartners Administrators, Inc. (collectively referred to as "HealthPartners"). (*Id.* at ¶ 27.) As set forth in the First Amended Complaint, HealthPartners designed this Plan, as well as

served as the third-party administrator for the Plan. (*Id.* at ¶¶ 25-26.) In 2015, the Plan contained an exclusion related to “[s]ervices and/or surgery for gender reassignment.” (*Id.* at ¶ 33.)

Olson is Tovar’s son, and he became a beneficiary of the Plan beginning on October 1, 2014. (*Id.* at ¶ 18.) In November 2014, at the age of 16, Olson was allegedly diagnosed with gender dysphoria, which is a condition arising when an individual’s gender identity differs from the gender assigned at birth. (*Id.* at ¶ 19.) Such individuals are more commonly known as “transgender,” while individuals whose gender identity is aligned with the gender they were assigned at birth are referred to as “cisgender.” (*Id.* at ¶ 20.)

Tovar and Olson contend they sought coverage for health care treatment for Olson’s gender dysphoria under the Plan. (*Id.* at ¶ 23.) However, because the Plan contained the exclusion set forth above, Olson alleges he was “denied insurance coverage for health care that his providers had deemed medically necessary.” (*Id.* at ¶ 34.) The First Amended Complaint specifically alleges three instances in which Tovar and Olson sought coverage for treatment:

1. In April 2015, Olson was prescribed a drug called Lupron. (*Id.* at ¶ 43.) This drug is prescribed for treatment of painful menstruation, but can also temporarily suspend menstruation, which was the purpose of Olson’s prescription. (*Id.* at ¶¶ 44-45.) HealthPartners denied the claim allegedly because Lupron was not covered under the Plan for that purpose due to the

exclusion. (*Id.* at ¶ 47.) Because the cost of the drug was \$9,000, neither Tovar nor Olson purchased the prescription. (*Id.* at ¶¶ 58, 62.)

2. Olson was also prescribed Androderm, a form of testosterone, to treat his gender dysphoria. (*Id.* at ¶ 63.) Coverage was also denied because the medicine was “for use by males only” and was “not covered for patient gender.” (*Id.* at ¶ 65.) Tovar paid for this prescription out-of-pocket, but was reimbursed for the expenses and was ultimately provided coverage for Androderm. (*Id.* at ¶¶ 66-67.)
3. In December 2015, Tovar contacted HealthPartners to inquire about pre-authorization for gender reassignment surgery for Olson. (*Id.* at ¶ 68.) She was allegedly told the surgery would not be authorized. (*Id.*) There are no allegations that Olson sought gender reassignment surgery.

Initially, this matter involved only employment claims against Essentia by Tovar, but these claims were dismissed and the dismissal was affirmed on appeal. *Tovar v. Essentia Health*, 857 F.3d 771, 777 (8th Cir. 2017). Now, Olson himself has brought a Section 1557 claim against Essentia. Olson contends that Essentia discriminated against him “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’” and alleges that he suffered “economic harm and emotional distress” due

to Essentia's actions.¹ (*Id.* at ¶¶ 80-81.) Tovar is no longer an employee of Essentia, and neither Tovar nor Olson is currently covered by the Plan. (*Id.* at ¶ 73.)

II. DHHS Regulations

On September 8, 2015, DHHS issued a proposed rule on Section 1557, which sought to promulgate regulations to implement its nondiscrimination requirements. 80 Fed. Reg. 54172 (Sept. 8, 2015). DHHS ultimately issued the final rule on May 18, 2016 (the "Final Rule"). Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376 (May 18, 2016). In relevant part, the Final Rule provided that under Section 1557, a covered entity shall not, in providing or administering health-related insurance or other health-related coverage, discriminate on the basis of sex (among other protected classes). 81 Fed. Reg. 31471 (codified at 45 C.F.R. § 92.207(a)). "Sex," as defined by DHHS in the Final Rule, included "gender identity," meaning an individual's internal sense of gender, which may be different from an individual's sex assigned at birth. 81 Fed. Reg. 31467 (codified at 45 C.F.R. § 92.4). Thus, DHHS additionally provided in the Final Rule that a "categorical coverage exclusion or limitation for all health services related to gender transition" would violate the regulations. 81 Fed. Reg. 31472 (codified at 45 C.F.R. § 92.207(b)(4)).

DHHS provided that the effective date of the Final Rule was July 18, 2016. 81 Fed. Reg. 31376. However, to the extent that the Final Rule required changes to health insurance or group health plan benefit design, the Final Rule had an applicability date of

¹ Tovar and Olson jointly assert the same claim against HealthPartners. (*Id.* at ¶¶ 74-77.)

the first day of the first plan year beginning on or after January 1, 2017. 81 Fed. Reg. 31376. Essentia met the requirements of the Final Rule far in advance of this date, as admitted by Olson in the First Amended Complaint, by removing the plan exclusion a full year before the regulatory requirements, with the Plan year beginning January 1, 2016. (Doc No. 66 at ¶ 73.)

III. Nationwide Injunction and DHHS' Review of Regulations

On December 31, 2016, the eve for health plan compliance under Section 1557, the Honorable Reed O'Connor in the United States District for the Northern District of Texas issued a nationwide injunction on the Final Rule to the extent it included "gender identity" within the definition of sex discrimination. *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016). The Court issued the injunction because it found the regulations related to gender identity exceeded DHHS' statutory authority and, therefore, violated the Administrative Procedures Act ("APA"). *Id.* at 695. Since this injunction has been in place, DHHS voluntarily requested the Court stay the proceedings in order to provide the agency an opportunity to reevaluate the regulations and address the issues raised in the litigation through proper rulemaking proceedings. *Franciscan Alliance, Inc. v. Price*, 2017 WL 3616652, at *3 (N.D. Tex. July 10, 2017). The Court granted the stay. *Id.* at *5. During this stay, DHHS has provided three status reports to the Court, all of which indicate that DHHS is reevaluating the regulations and anticipates the submission of the new proposed rule will be in due course. *See Franciscan Alliance, Inc. v. Price*, Case No. 7:16-cv-00108 (Doc No. 106, 109, 110).

LAW AND ARGUMENT

I. This Court should dismiss Olson’s Section 1557 claim against Essentia for failure to state a claim upon which relief can be granted.

To survive a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While a complaint need not contain “detailed factual allegations,” it must contain facts with enough specificity “to raise a right to relief above the speculative level.” *Id.* at 555. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” will not pass muster. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). In short, this standard “calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim].” *Twombly*, 550 U.S. at 556.

Olson’s sole claim against Essentia is a Section 1557 claim. Olson alleges that Essentia discriminated against him on the basis of his gender identity in violation of Section 1557 by maintaining an exclusion in its health plan for gender reassignment surgery or services. This cause of action, however, fails to state a claim against Essentia upon which relief can be granted on its face and should be dismissed with prejudice.

A. The plain language of Section 1557 does not address claims of discrimination based on gender identity.

Section 1557 prohibits a health program or activity receiving federal financial assistance from discriminating against individuals on the basis of grounds listed in four different civil rights statutes, including Title IX, which prohibits discrimination “on the basis of sex.” 42 U.S.C. § 18116(a); 20 U.S.C. § 1681(a). Section 1557 neither

expressly prohibits discrimination on the basis of “gender identity” nor incorporates any statute which expressly does so. Moreover, courts expressly analyzing Section 1557 have held the statute does not confer a claim for gender identity discrimination, such as in *Baker v. Aetna Life Ins. Co.*, 228 F. Supp. 3d 764, 768 (N.D. Tex. 2017).

In *Baker*, a plaintiff brought a Section 1557 claim against his employer and the third-party administrator of his employer’s health plan, contending that the denial of coverage under the plan for gender transition services was discrimination on the basis of gender identity. *Id.* at 766. The employer moved to dismiss the claim for failure to state a claim upon which relief can be granted. The Court granted the motion, finding Section 1557 does not provide a claim for gender identity discrimination. *Id.* at 768.

According to the *Baker* Court, no controlling precedent recognizes such a claim under either the express language of Section 1557 or any statute referenced within Section 1557. *Id.* at 768. The plaintiff in *Baker* attempted to rely on the DHHS regulations (at the time only proposed), which purported to prohibit discrimination on the basis of gender identity under Section 1557. *Id.* The Court, however, rejected this argument, as the alleged denials of coverage occurred before the effective date of the regulations and the employer could not have been bound to comply with these regulations retroactively. *Id.* Finding no cognizable cause of action under Section 1557 for a claim of gender identity discrimination, the Court dismissed the claim. *Id.* at 769.

In issuing the nationwide injunction related to the Final Rule, the Court in *Franciscan Alliance* reached the same conclusion as *Baker* that the prohibition of discrimination “on the basis of sex” incorporated into Section 1557 does not include

discrimination “on the basis of gender identity.” *Franciscan Alliance*, 227 F. Supp. 3d at 689. In the case, the Court was tasked with determining whether DHHS exceeded its congressional authority by expanding the definition of “on the basis of sex” from Title IX to include “gender identity.” The Court determined the agency did so, noting “[t]he text of Title IX indicates Congress’s binary definition of ‘sex.’” *Id.* at 687.

The Court noted that when Title IX was enacted in 1972, the term “sex” was commonly understood to refer to the biological differences between males and females. *Id.* at 688. “If Congress had intended to enact a new, different, or expansive definition of prohibited sex discrimination in Section 1557, it knew how to do so and would not have chosen to explicitly incorporate its meaning from Title IX.” *Id.* at 688; *see also Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that Congress has chosen not to amend Title VII, which similarly prohibits discrimination “because of sex,” to protect transgender status and, therefore, the term is given its traditional definition and transgender status does not fall within the purview of the Act). Moreover, enactments passed by Congress subsequent to the ACA expressly provide for protection based on “gender identity.” *Id.* at 689 (citing 19 U.S.C. § 249(a)(2)(A) and 42 U.S.C. § 13925(b)(13)(A), both including “gender identity”). Thus, the Court determined “Title IX and Congress’s incorporation of it in the ACA unambiguously adopted the binary definition of sex.” *Id.* DHHS has now voluntarily requested a stay of the action in order

to revisit the regulations in light of the Court's order. *Franciscan Alliance*, 2017 WL 3616652, at *5.²

Although the issue in *Franciscan Alliance* was enforcement of the Final Rule, the Court's holding goes to the heart of this case related to whether the definition of "on the basis of sex" incorporated into Section 1557 includes "on the basis of gender identity." The *Franciscan Alliance* Court determined it does not. The *Baker* case determined the same. Olson presents the same type claim as described in the *Baker* case. Olson asserts a Section 1557 claim against Essentia, as his mother's former employer who maintained a self-insured health plan under which he was a beneficiary. Similar to *Baker*, however, Olson does not state a claim upon which relief can be granted because Section 1557 does not incorporate a prohibition of discrimination on the basis of gender identity on its face.³ Accordingly, this Court should dismiss Olson's claim against Essentia with prejudice pursuant to Fed.R.Civ.P. 12(b)(6).

² In addition, other federal agencies have revised guidance on the interpretation of Title IX's prohibition of discrimination "on the basis of sex," expressing doubt that it expands to discrimination "on the basis of gender identity." U.S. Dep't of Justice & U.S. Dep't of Educ. Letter (Feb. 22, 2017), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> (joint letter from the United States Department of Justice and Department of Education rescinding previous guidance from 2015 and 2016 that "sex" within Title IX extends to gender identity because this guidance did not "explain how this position is consistent with the express language of Title IX").

³ Also similar to *Baker*, all of the alleged coverage denials in the First Amended Complaint occurred before the effective date of the Final Rule, which sets forth specific requirements for health plans. As set forth in Section B., Essentia cannot be held liable because it complied fully with these effective dates and removed the exclusion at issue a full year before the Final Rule's effective date related to health plans. Under these facts, dismissal of Olson's claim is necessary.

B. In the alternative, the language of Section 1557 is ambiguous and agency guidance related to Section 1557 expressly provided notice of when recipients of federal funds must change health plans, with which Essentia complied in its entirety.

The Eighth Circuit Court of Appeals has yet to address the issue of whether Section 1557 incorporates discrimination on the basis of gender identity, but Judge Nelson in the United States District Court for the District of Minnesota examined a Section 1557 claim for alleged discrimination based on gender identity in *Rumble v. Fairview Health Services*, 2015 WL 1197415 (D. Minn. Mar. 16, 2015). Recognizing the matter was one of “first impression,” the Court engaged in traditional canons of statutory in order to interpret Section 1557. *Rumble*, 2015 WL 1197415, at *9. The Court found the plain language alone did not address the issue of the scope of Section 1557. *Id.* Thus, Judge Nelson determined language of Section 1557 is ambiguous as it refers to different civil rights statutes, which incorporate different standards for liability, causation, and burden of proof. *Id.* at *10. Because the statute is ambiguous, the Court relied on agency interpretation for guidance on Section 1557. *Id.*; *see also id.* at *9 (stating “if the language of the statute is ambiguous or silent, the issue for the court is whether the agency’s interpretation of the statute is a reasonable one”).

Judge Nelson specifically looked to DHHS interpretation, as it is the agency responsible for promulgating regulations pursuant to Section 1557. *Id.* at *10. At the time, however, DHHS had not yet issued the proposed rules. Therefore, the Court resorted to an opinion letter from the Office of Civil Rights regarding its interpretation of Section 1557. *Id.*

This Court should look to the *Rumble* case and its emphasis on the need for agency interpretation and notice of its interpretation of Section 1557. In determining whether the First Amended Complaint states a claim against Essentia, a primary issue is the notice the responsible agency provided related to health plan compliance under Section 1557. Following Judge Nelson's initial decision in *Rumble*, DHHS issued the Final Rule interpreting Section 1557. This Final Rule expressly gave notice to recipients of federal funds related to potential liability under Section 1557, particularly with regard to health plans. 81 Fed. Reg. 31376. In this regard, DHHS provided the Final Rule itself was generally effective July 18, 2016. *Id.* To the extent any provisions of the Final Rule required changes to health insurance or group health plan benefit design, however, the applicability date was "the first day of the first plan year . . . beginning on or after January 1, 2017." *Id.*

The notice provided by DHHS within the Final Rule was mandated by Title IX, which Section 1557 expressly incorporates by reference. "Title IX was enacted as an exercise of Congress' powers under the Spending Clause." *Wells v. Hense*, 235 F. Supp. 3d 1, 7 n.2 (D.D.C. 2017). As a statute invoked under this clause, Congress may expressly condition the receipt of federal funds on the recipients' agreement to comply with designated, federally imposed conditions. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Thus, as noted by the United States Supreme Court, statutes invoking this power are essentially characterized as "much in the nature of a *contract*" and "[j]ust as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and

knowingly accepts the terms of the ‘contract.’” *Id.* (emphasis in original). “Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” *Id.* (emphasis added); *see also Wells*, 235 F. Supp. 3d at 7 n.2 (stating “private damages actions [under Title IX] are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue”) (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999)).

Prior to the issuance of DHHS’ regulations interpreting Section 1557, the legal landscape related to the statute was anything but clear. *See Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Penn. 2015) (“[I]t does not appear that any federal courts have addressed the precise question of whether a student can assert a claim for discrimination on the basis of his transgender status under Title IX.”); *see also* Doc No. 66 at ¶ 32 (alleging that of the 260 self-insured plans administered by Defendant HealthPartners in 2015, only 13 covered gender reassignment). The issuance of the Final Rule was clear notice regarding the scope of potential liability to recipients of federal funds, such as Essentia, under Section 1557 for employee benefit plans. The Final Rule was also clear regarding when these recipients of federal funds must comply with DHHS’ interpretation of Section 1557. Essentia fully complied with the effective date of this Final Rule and, in fact, complied a full year prior to the effective date of the Final Rule with respect to health plans. The Plaintiffs admit the same within the First Amended Complaint, and none of their allegations related to denials of coverage occurred after Essentia complied with the Final Rule.

In short, to the extent this Court finds the language of Section 1557 ambiguous, this Court should look to agency interpretation of Section 1557, as did the Court in *Rumble*. Because *Rumble* lacked the DHHS guidance now set forth in the Final Rule, this Court should find the Final Rule provides the necessary notice to recipients of federal funds, like Essentia, of the scope of potential liability, as required by Title IX. On the face of the First Amended Complaint, the Plaintiffs agree that Essentia complied with the Final Rule, as the exclusion at issue was removed an entire year before the Final Rule's effective date. Accordingly, the First Amended Complaint fails to state a claim upon which relief can be granted against Essentia and must be dismissed.

II. Alternatively, this Court should stay this case pending resolution of *Franciscan Alliance* and issuance of new regulations from DHHS.

If this Court declines to dismiss the action against Essentia, it should nonetheless issue a stay of this case, including any and all discovery. “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Bae Sys. Land & Armaments L.P. v. Ibis Tek, LLC*, 124 F. Supp. 3d 878, 889 (D. Minn. 2015) (quoting *Cottrell v. Duke*, 737 F.3d 1238, 1248 (8th Cir. 2013)). The Court maintains broad discretion to issue a stay and should consider factors, such as “the conservation of judicial resources and the parties’ resources, maintaining control of the court’s docket, providing for the just determination of cases, and the hardship or inequity to the party opposing the stay.” *Rumble v. Fairview Health Servs.*, 2017 WL 401940, at *2 (D. Minn. Jan. 30, 2017).

Ultimately, “the decision to stay should weigh the competing interests and maintain an even balance.” *Id.* In weighing these factors, a stay of this case is warranted, as this Court is bound by the nationwide injunction in *Franciscan Alliance* related to the Final Rule’s prohibition on discrimination based on gender identity; DHHS has expressed its intention to revisit the same regulations in the near future; and the parties would not be prejudiced by a stay to await a final decision from *Franciscan Alliance* and action by DHHS, which are central to the issue presented in this case.

A. This Court is bound by the nationwide injunction issued in *Franciscan Alliance*.

Judge O’Connor in *Franciscan Alliance* issued an injunction related to the Final Rule. Specifically, the Court determined the Final Rule’s prohibition of discrimination on the basis of gender identity was contrary to the law of Title IX and, consequently, violated the APA because it exceeded the grounds incorporated by Section 1557. *Franciscan Alliance*, 227 F. Supp. 3d at 689. This injunction bears directly on the issue involved in this case regarding whether Section 1557’s prohibition of discrimination “on the basis of sex” extends to claims of discrimination on the basis of gender identity.

Importantly, the injunction in *Franciscan Alliance* is also on a nationwide basis. Federal courts are vested with judicial power to issue nationwide injunctions in appropriate circumstances. *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015). “The scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In cases where a party challenges an agency action under the APA, such as

the plaintiffs in *Franciscan Alliance*, a nationwide injunction is proper given the agency action extending throughout the nation. See *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2003) (“As a general matter, an agency action that violates the APA must be set aside.”); *Nat’l Min. Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1407-08 (D.C. Cir. 1998) (invalidating an agency rule and issuing nationwide relief). The Court in *Franciscan Alliance* expressly considered the appropriate scope of the injunction, and finding the Final Rule’s “harm is felt by healthcare providers and states across the county,” it properly entered a nationwide injunction regarding the Final Rule’s prohibition of discrimination on the basis of “gender identity.” *Franciscan Alliance*, 227 F. Supp. 3d at 695.

Given the nationwide application of the injunction, it is binding on this Court. This nationwide injunction not only affected the parties involved in *Franciscan Alliance*, it affected “all application and enforcement of the regulation.” *Jordan v. Pugh*, 2007 WL 2908931, at *4 (D. Colo. Oct. 4, 2007) (emphasis added); see *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) (“When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”). As the nationwide injunction is still in place regarding the regulations addressing the very issue posed in this case, a stay is necessary and appropriate to await a final determination in *Franciscan Alliance*.

B. DHHS will likely be issuing new regulations directly affecting this case.

Following the Court's issuance of the nationwide injunction in *Franciscan Alliance*, DHHS voluntarily requested the Court stay the matter to allow the agency "an opportunity to reevaluate the regulation and address the issues raised in [the] litigation through proper rulemaking proceedings." *Franciscan Alliance*, 2017 WL 3616652, at *3. In light of DHHS' "desire to reassess the reasonableness, necessity, and efficacy of the [Final Rule]," the Court granted the request to stay because the agency's reconsideration may moot some or all of the claims presented in the case and, accordingly, saves judicial and party resources. *Id.* at *5. Since granting the stay, DHHS has provided three status reports to the Court, each of which indicate DHHS anticipates submission of a new proposed rule in due course. *Franciscan Alliance, Inc. v. Price*, Case No. 7:16-cv-00108 (Doc No. 106, 109, 110).

Given DHHS' intention to change the regulations at issue in *Franciscan Alliance*, a stay of this case is also proper to await this agency action. *Robinson v. Dignity Health*, 2016 WL 7102832, at *2 (N.D. Cal. Dec. 6, 2016) ("A trial court may, with propriety, find it efficient for its own docket and the fairest course for the parties to enter a stay an action before it, pending resolution of independent proceedings which bear upon the case."). The regulations play a key role in interpreting Section 1557 and, specifically, whether it prohibits discrimination on the basis of gender identity. Thus, DHHS' reconsideration of the Final Rule in this respect will be instructive to the exact issue presented in this case. Because both the parties' and Court's resources will be conserved in awaiting DHHS' action, a stay of this action is warranted.

C. The parties will not suffer prejudice for a stay to await a final determination by the Court in *Franciscan Alliance* and new regulations from DHHS.

Although this case has been pending since 2016, Essentia was only recently re-named as a defendant in this case, following dismissal of all claims previously raised against it in this action. This case is still at a preliminary motion to dismiss phase; no party has engaged in any discovery. Granting a stay to await key decisions in the *Franciscan Alliance* case and agency action by DHHS will assist the parties to determine with specificity the scope of the issues (and the parties) moving forward in this case, or whether the case will move forward at all. All parties would save greatly on litigation expenses by simply holding this case in abeyance, while independent actions central to the issue at hand are ongoing. Other courts have concluded the same and granted motions to stay in light of the uncertain legal landscape on Section 1557, including the United States District Court for the District of Minnesota. *Rumble*, 2017 WL 401940, at *2 (issuing a stay and finding that the *Franciscan Alliance* nationwide injunction was binding on the court); *see also Robinson*, 2016 WL 7102832, at *3 (granting a motion to stay in a Section 1557 action prior to the issuance of the nationwide injunction).

Neither Tovar nor Olson will suffer prejudice if this action were stayed. Any alleged prejudice argued by the plaintiffs is dubious, at best, given that this case is in the early stages, Olson was only recently added as a plaintiff, the exclusion at issue in the Plan was removed in January 2016, and neither Tovar nor Olson has been a beneficiary of the Plan since 2016. There is further no suggestion that Defendants have been responsible for any delays in this case to date. However, even if Plaintiffs contend there

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Brittany R. Tovar and Reid Olson,

**LR 7.1(f) & LR 72.2(d)
CERTIFICATE OF COMPLIANCE**

Plaintiff(s)

v.

Case Number: 0:16-cv-00100-DWF/LIB

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

Defendant(s)

I, Lisa Edison-Smith, certify that the

- Memorandum titled: **Defendant Essentia Health and Innovis Health, LLC's Memorandum in Support of Motion to Dismiss or, in the Alternative, Motion to Stay** complies with Local Rule 7.1(f).

or

- Objection or Response to the Magistrate Judge's Ruling complies with Local Rule 72.2(d).

I further certify that, in preparation of the above document, I:

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I further certify that the above document contains the following number of words: **5,406**

Date: January 16, 2018

/s/ Lisa Edison-Smith

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