

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 REPLY IN SUPPORT OF
MOTION TO DISMISS OR, IN THE
ALTERNATIVE, MOTION TO
STAY**

INTRODUCTION

Section 1557 of the Patient Protection and Affordable Care Act (“ACA”) incorporates Title IX’s prohibition of discrimination “on the basis of sex.” Although not vexatious on its face, the boundaries and meaning of this phrase have been anything but clear and grappled with by the courts. In this matter, even if Section 1557 encompasses gender identity, as alleged by Plaintiffs, clear notice of the conditions required to comply with Section 1557 was required to alert covered entities, such as Defendants Essentia Health and Innovis Health, LLC (collectively, “Essentia”), of potential liability under the statute. This clear notice was not issued until the Department of Health and Human Services (“DHHS”) promulgated final regulations enforcing the statute on May 18, 2016. No other guidance or agency action provided this necessary notice, detailing the conditions for compliance for the terms and conditions of health plans.

Likely recognizing that the final regulations would require significant changes to the language of many, if not most, existing plans, DHHS specifically included future effective dates for health plans to comply with the regulations. Essentia fully met, and exceeded, these implementation deadlines. Plaintiffs admit the same within the First Amended Complaint. Based on these facts, the First Amended Complaint is facially deficient and must be dismissed with prejudice. The First Amended Complaint further is devoid of any allegations of deliberately indifferent behavior on the part of Essentia. Because deliberate indifference is required to state a cause of action for sex discrimination under Title IX, the First Amended Complaint should similarly be dismissed as to Essentia.

In the alternative, a stay of this action is appropriate in light of the nationwide injunction issued in *Franciscan Alliance* related to the DHHS regulations at the heart of this case. Courts have made clear this injunction extends not only to DHHS' enforcement, but also private litigation, such as Plaintiffs' action. Moreover, a brief stay of this case pending a final decision in *Franciscan Alliance* or further DHHS action would greatly benefit the parties and the Court in deciding a key issue in this case regarding the scope of Section 1557. Plaintiffs have not argued that they will suffer any prejudice if this action were stayed pending resolution of these important matters, nor will they suffer any prejudice, given that they are no longer beneficiaries of the Essentia health plan. Thus, if this Court does not dismiss this action, it should issue a stay.

LAW AND ARGUMENT

I. The First Amended Complaint fails to state a claim against Essentia upon which relief can be granted because Essentia fully complied with conditions set forth under Section 1557.

Plaintiffs do not dispute that because Section 1557 incorporates Title IX and Title IX was enacted as an exercise of Congress' power under the Spending Clause, recipients of federal funds must have adequate notice of circumstances that may subject them to liability under the statute. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). This notice, as explained by the United States Supreme Court, must be "clear." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). In other words, though Congress has broad power to set terms on the receipt of federal funds, it must set out the conditions "unambiguously" when attaching conditions to acceptance of federal funds. *Id.* Thus, "to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). A recipient "cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.*; see *King v. Sebelius*, 997 F. Supp. 2d 415, 430 (E.D. Va. 2014).

If the incorporation of Title IX's prohibition of discrimination "on the basis of sex" extends to "gender identity" under Section 1557,¹ recipients of federal funds (such

¹ Essentia does not concede that Section 1557's incorporation of the Title IX prohibition of discrimination "on the basis of sex" includes "gender identity." As discussed in Essentia's memorandum in support of its motion to dismiss or, in the alternative, motion to stay, the plain language of Section 1557 does not extend to gender identity and caselaw interpreting Section 1557 has held it does not incorporate gender

as Essentia) did not have “clear notice” of this prohibition until DHHS—the department authorized by Congress to promulgate regulations to implement the nondiscrimination provisions of Section 1557—issued a final rule regarding Section 1557’s nondiscrimination requirements on May 18, 2016 (the “Final Rule”). 81 Fed. Reg. 31376 (May 18, 2016). Essentia revised its health plan to eliminate its exclusion of gender transition services effective January 1, 2016, a full year before the Final Rule required compliance. *Id.* Plaintiffs admit the same within the First Amended Complaint. (Doc No. 66, First Am. Compl. at ¶ 73.) Because Essentia fully complied with the Final Rule before its effective date, it cannot be held liable to Plaintiff Olson for the allegations described in the First Amended Complaint, all of which occurred before the Final Rule was issued. On its face, the First Amended Complaint fails to state a claim against Essentia upon which relief can be granted and should be dismissed.

A. Essentia did not have sufficient notice of potential liability under Section 1557 prior to the issuance of the Final Rule.

Plaintiffs’ citation to a single opinion letter from the Office of Civil Rights (“OCR”) in 2012 does not suffice as clear notice, required under the Spending Clause. While the letter from OCR provided an opinion that it believed Section 1557’s sex discrimination prohibition extends to claims of discrimination based on gender identity, it hardly provided notice to Essentia of its obligations as a health plan sponsor under Section 1557. Letter from Leon Rodriguez, Dept. of Health & Human Servs., to Maya

identity discrimination, as well. For purposes of brevity, those arguments will not be repeated in this reply.

Rupert, Nat'l Ctr. for Lesbian Rights (July 12, 2012). OCR did not provide any analysis regarding its conclusion nor did OCR delve into the scope of liability for sponsors of health plans. In fact, the OCR letter made no mention of health plans, including whether or not it believed maintaining an exclusion related to gender reassignment services or surgery in a health plan would be discrimination on the basis of gender identity. The letter is entirely silent on the contours of liability.

Plaintiffs mistakenly assert that this letter discussed application of existing civil rights law. Again, there is no analysis in the letter to support this claim and certainly nothing that is sufficient to provide Essentia clear notice of its obligations with regard to its healthcare plan. Even if the letter had discussed the caselaw under Title IX holding that “sex” extends to “gender identity,” the caselaw is far from uniform on this issue. In fact, courts have taken the opposite position that “sex” within Title IX does not encompass “gender identity.” *See Johnston v. Uni. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676 (W.D. Penn. 2015) (holding Title IX’s “on the basis of sex” does not include “gender identity”); *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 689 (N.D. Tex. 2016) (same); *see also Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding transgender status not protected under Title VII). Moreover, contrary to Plaintiff’s assertion, the Eighth Circuit has not yet established a clear position in these uncertain legal issues to date. *See Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 704 (8th Cir. 2012) (deciding only that the plaintiff failed to establish his employer’s awareness of the fact that he was transgender and, therefore, affirming summary judgment).

This deep divide in decisions across the courts highlights the fact that Section 1557—and its incorporation of Title IX’s prohibition of discrimination “on the basis of sex”—is ambiguous with respect to its intended scope of protection and whether it in fact includes “gender identity.” *See Rumble v. Fairview Health Servs.*, 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015) (finding Section 1557’s language ambiguous). This divergence in opinions further highlights that if Section 1557 does indeed extend to a prohibition on the basis of gender identity, recipients of federal funds (like Essentia) had no clear notice of this prohibition until DHHS issued the Final Rule.

In the Final Rule issued in 2016, DHHS officially defined “on the basis of sex” to include “gender identity,” meaning an individual’s internal sense of gender. 81 Fed. Reg. 31467. This Final Rule also noted that commentators disagreed with this particular definition because these commentators believed it erroneously interprets Title IX and exceeds the scope of this statute. *Id.* at 31388, 31435. In response, OCR provided a lengthy argument espousing the reasons for its belief that Title IX’s “on the basis of sex” includes “gender identity” based on OCR’s interpretation of the law. *Id.* at 31388-89, 31435.

This lengthy discussion underscores that DHHS implicitly recognized the dispute and uncertainty related to Title IX’s definition of “sex” and that its definition was anything but clear based simply on interpretations from agencies and caselaw. By promulgating regulations expressly defining “sex” to include “gender identity,” DHHS sought to eliminate the uncertainty regarding this definition. Thus, this Final Rule

provided the “clear notice” of the scope of liability from DHHS, the agency specifically designated by Congress to promulgate regulations on Section 1557.

B. Assuming there was notice that Section 1557 included a prohibition of discrimination based on gender identity, the Final Rule provided clear notice of the scope of potential liability under Section 1557 for sponsors of health plans.

Even if this Court assumes the single opinion letter from OCR in 2012 provided Essentia notice, the notice it provided was limited. This letter would have only alerted Essentia that Section 1557 encompassed claims for discrimination on the basis of gender identity. Other regulations cited by Plaintiffs related to the ACA would have the same limited effect.² (*See* Doc No. 84, Pls’ Memo. in Opp. at 7 (citing portions of the ACA only referring to “gender identity”).)

The Spending Clause, however, specifically speaks to “conditions” accepted by recipients of federal funds. *Arlington*, 548 U.S. at 296; *Pennhurst*, 451 U.S. at 17. Prior to the issuance of the Final Rule, sponsors of health plans did not know the conditions necessary to comply with Section 1557 nor did they have clear notice of the circumstances under which they may be held liable. *See Rumble*, 2015 WL 1197415, at 11 (noting the OCR letter did not express an opinion on matters outside simply that Section 1557 prohibits discrimination based on gender identity). With the issuance of the

² The regulations are also inapplicable to this case because, as admitted by Plaintiffs, they pertain to State-run insurance exchanges, which are not at issue in this case. Nonetheless, these regulations cannot serve as notice that Section 1557’s incorporation of sex discrimination included gender identity discrimination, as the regulations themselves did not define “sex” to include “gender identity.” Rather, DHHS expressly listed gender identity as a separate class than sex. As such, they provide no support for Plaintiffs’ position in this matter.

Final Rule, DHHS set forth the conditions unambiguously. *See Arlington*, 548 U.S. at 296.

In fact, this Final Rule outlined clearly and with specificity not only the definition of “on the basis of sex,” but also specific instances in which covered entities may be subject to liability. For example, the Final Rule indicated that simply having an exclusion in a policy for all health services related to gender transition was unlawful under Section 1557. 81 Fed. Reg. 31429. The Final Rule did not affirmatively require covered entities to cover any particular treatment, but it did require that any exclusion be evidence-based and nondiscriminatory. *Id.* at 31435.

The Final Rule expressly implicated health plans. In fact, DHHS noted that “many health-related insurance plans or other health-related coverage, including Medicaid programs, currently have explicit exclusions of coverage for all care related to gender dysphoria or associated with gender transition.” *Id.* at 31429 (emphasis added). As a result, DHHS intentionally provided a separate, extended date for covered entities to amend their plans to be in compliance with the Final Rule. While the general effective date for the Final Rule was July 18, 2016, the provisions of the Final Rule requiring changes to group health plan benefit design had “an applicability date of the first day of the first plan year beginning on or after January 1, 2017.” *Id.* at 31376 (emphasis added).

By allowing a grace period, DHHS recognized the lack of clarity on issues related to exclusions within health plans and the extent of coverage necessary under those plans. This grace period allowed covered entities to review the notice provided by the Final Rule, revise health plans, and put those plans into place. In providing a discrete and

extended compliance date for health plans, DHHS provided clear notice to covered entities, including sponsors of health plans, of their obligations and time to make necessary plan revisions.

Essentia not only met this compliance date, it exceeded it by a full year. Essentia, therefore, cannot be held liable for the allegations within the First Amended Complaint, which only describes events occurring prior to the effective date of the Final Rule.³ Under these circumstances, dismissal of the First Amended Complaint is proper.

C. Assuming there was notice that Section 1557 included a prohibition of discrimination based on gender identity, Essentia did not act with deliberate indifference to Plaintiffs on the face of the First Amended Complaint.

Even if this Court determines that Essentia had notice of the conditions of liability under Section 1557 particularly related to health plans and gender transition services, the First Amended Complaint must fail. As noted in Defendants HealthPartners, Inc. and HealthPartners Administrators, Inc.’s memorandum in support of their motion to dismiss, a plaintiff may not recover damages under Title IX unless an official with authority to address a complaint has actual notice of the complaint and acts “deliberately indifferent” to the alleged misconduct. *Grandson v. Univ. of Minn.*, 272 F.3d 568, 576 (8th Cir. 2001) (citing *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998)). Based on the

³ To hold Essentia liable for these actions—though it fully complied with the effective date of the Final Rule—would result in liability against virtually all health plans prior to 2017, as DHHS recognized that many plans (including Medicaid) had an exclusion. Notably, as of the same date Essentia removed its exclusion, the U.S. Office of Personnel Management did the same. See Letter from John O’Brien, U.S. Office of Personnel Mgmt., to All FEHB Carriers (June 23, 2015), *available at* www.opm.gov/healthcare-insurance/healthcare/carriers/2015/2015-12.pdf.

facts alleged in the First Amended Complaint, Essentia did not act “deliberately indifferent” in any respect to Plaintiff Olson.

Rather, Essentia promptly responded to Plaintiffs’ concerns in several respects upon receiving notice of Plaintiffs’ concerns. Plaintiff Olson was prescribed Androderm, a form of testosterone, to treat gender dysphoria, and although it was initially denied, Essentia agreed to reimburse Plaintiff Tovar for any expense related to the drug. (Doc No. 66, First Am. Compl. at ¶¶ 66-67.) Plaintiffs suffered no other out-of-pocket expenses, as admitted within the First Amended Complaint.

Moreover, at the first opportunity to change the plan in response to Plaintiffs’ concerns, Essentia did so. Plaintiffs agree that as of January 1, 2016, the next plan year, Essentia requested HealthPartners remove the exclusion at issue and it did so. (*Id.* at ¶ 73.) At no point in the First Amended Complaint do Plaintiffs allege Essentia acted with “deliberate indifference” to the issues they raised. Indeed, no such deliberate indifference exists. In the absence of any evidence of deliberate indifference on the part of Essentia, the First Amended Complaint must fail against these defendants.

II. Alternatively, a stay of this case is necessary, as the regulations directly addressing issues in this case are enjoined and Plaintiffs have not shown they would be prejudiced by a brief stay of this action.

If this Court declines to dismiss Plaintiff Olson’s claim against Essentia, this Court nonetheless should stay this action. Contrary to Plaintiffs’ assertion, the nationwide injunction on the Final Rule, as expressed in *Franciscan Alliance*, does apply to this Court and Plaintiffs’ action. Also contrary to Plaintiffs’ assertion, other courts have relied on *Franciscan Alliance* to stay actions involving the same claim at issue in this

case. Plaintiffs have not expressed any prejudice they would suffer if this Court issues a brief stay related to this matter, and in fact, they would not suffer any prejudice because they are no longer beneficiaries of Essentia's health plan and Plaintiff Olson has only recently brought his claim against Essentia. A stay under these circumstances is proper.

A. The nationwide injunction issued in *Franciscan Alliance* applies to Plaintiffs' action.

As this Court is well aware, the Court in *Franciscan Alliance* issued a nationwide injunction on the Final Rule to the extent it expanded the definition of "sex" within Section 1557 to include "gender identity." *Franciscan Alliance*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016). The *Franciscan Alliance* Court did not limit this injunction to simply the enforcement agency – DHHS. Rather, the Court expressly noted the widespread harm the Final Rule has on healthcare providers and states across the country and, consequently, issued the nationwide injunction. *Id.* Because the injunction applies on a nationwide basis, it affects not only the parties in *Franciscan Alliance*, but also "all application and enforcement of the regulation." *Jordan v. Pugh*, 2007 WL 2908931, at *4 (D. Colo. Oct. 4, 2007). This injunction, therefore, applies to the Plaintiffs' action, which directly bears on the same issue of whether the prohibition of discrimination on the basis of sex in Section 1557 includes gender identity.

Plaintiffs' argument that the injunction only affects DHHS enforcement was expressly addressed and rejected by the Court in *Rumble v. Fairview Health Services*, 2017 WL 401940 (D. Minn. Jan. 30, 2017). In *Rumble*, the Court noted the language of the ruling in *Franciscan Alliance* does not indicate that only enforcement actions were

enjoined. *Id.* at *4. The Court in *Rumble* further relied on *Franciscan Alliance* in issuing a stay of the Section 1557 claim at issue in the case. Though the *Rumble* Court also cited to a then-pending United States Supreme Court case—*Gloucester County School Board v. G.G.*, 137 S. Ct. 369 (2016)—that was expected to resolve an issue as to whether Title IX encompasses discrimination on the basis of gender identity, the Court nonetheless relied in part on the *Franciscan Alliance* injunction in its decision to stay the matter. *Id.*

This Court should follow *Rumble*'s analysis and similarly issue a stay in this Section 1557 case pending a resolution of *Franciscan Alliance*. A decision from *Franciscan Alliance*, though only related to the Final Rule, would undoubtedly be beneficial to the parties and the Court in analyzing the precise legal issue in this case. It would further be beneficial to the parties and Court to await pending agency action, as DHHS has warranted to the Court in *Franciscan Alliance* that it is revisiting the Final Rule in light of the injunction and, therefore, potentially the scope of Section 1557 and obligations of the parties under the statute. Allowing this case to move forward based on caselaw cited by Plaintiffs would be inefficient, as a key decision in *Franciscan Alliance* and agency action remains unresolved, which will assist the parties and Court define the issues in this case moving forward. Therefore, to conserve judicial and party resources, this Court should simply hold this case in abeyance until a final decision in *Franciscan Alliance* or DHHS' issuance of new regulations.

B. Plaintiffs will suffer no prejudice if this Court issues a stay.

In their response to Essentia's motion to stay, Plaintiffs have not expressed any harm or prejudice that they would suffer if this case were briefly stayed to await a key decision in *Franciscan Alliance*. Indeed, Plaintiffs can cite to no prejudice.

Essentia was only recently re-added to this case as a defendant, and Olson only recently joined this case as a plaintiff as of December 15, 2017. No party has engaged in any discovery. In fact, the parties are all still within the motion to dismiss phase of this lawsuit. Furthermore, neither Tovar nor Olson has been a beneficiary of the plan at issue since October 31, 2016. (Doc No. 66, First Am. Compl. at ¶ 73.) Tovar also is no longer an employee of Essentia, and there are no intentions for either Tovar or Olson to become beneficiaries of the plan again. (*Id.* at ¶ 16.) There is simply no continuing harm in this matter for Tovar or Olson to claim any prejudice from a brief stay.

Though a stay would delay this case for a brief time, this delay undoubtedly benefits all of the parties to await key decisions to clear the legal uncertainty regarding Plaintiffs' Section 1557 claims. The claims are truly matters of first impression for this Court. Awaiting further guidance on how to analyze these claims would aid both this Court and the parties.

CONCLUSION

For the foregoing reasons, Essentia respectfully requests this Court grant its motion to dismiss Olson's claim for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) or, alternatively, grant its motion to stay this action.

Dated this 20th day of February 2018.

VOGEL LAW FIRM

/s/ Lisa Edison-Smith

BY Lisa Edison-Smith (#266127)

Vanessa L. Lystad (#0394881)

218 NP Avenue

PO Box 1389

Fargo, ND 58107-1389

Telephone: 701.237.6983

Email: ledison-smith@vogellaw.com

vlystad@vogellaw.com

ATTORNEYS FOR ESSENTIA HEALTH
AND INNOVIS HEALTH, LLC DBA
ESSENTIA HEALTH WEST

3159436.6

**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 Reply 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:

- Used the following word processing program and version: **Microsoft Office Word 2007** and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

or

- Counted the words in the document.

I further certify that the above document contains the following number of words: **3,672**

Date: February 20, 2018

/s/ Lisa Edison-Smith

Lisa Edison-Smith (#266127)

Vanessa L. Lystad (#0394881)

VOGEL LAW FIRM

218 NP Avenue, P. O. Box 1389

Fargo, ND 58107-1389

Telephone: 701.237.6983

Email: ledison-smith@vogellaw.com

Email: vlystad@vogellaw.com

*Attorneys for Defendants Essentia Health and
Innovis Health, LLC dba Essentia Health West*

3171131.1