

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

CODY FLACK and
SARA ANN MAKENZIE,

Plaintiffs,

v.

Case No. 18-CV-0309

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
LINDA SEEMEYER, in her official
capacity as Secretary of the Wisconsin
Department of Health Services,

Defendants.

**DEFENDANTS' MOTION TO AMEND SCHEDULING ORDER ON
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendants Wisconsin Department of Health Services and Linda Seemeyer, in her official capacity as Secretary of the Wisconsin Department of Health Services (hereafter "DHS"), hereby move this Court for an order amending its text-only order, dated May 24, 2018, concerning Plaintiffs' motion for preliminary injunction. (Dkt. 18.) That text-only order set the deadline for DHS's brief in opposition as June 14, 2018, and also set the injunction hearing for June 27, 2018, at 2:30 p.m. DHS respectfully seeks an order setting the injunction hearing for a date no earlier than August 15, 2018, and DHS's brief in opposition for July 31, 2018. The grounds for this motion are as follows.

1. Plaintiffs Cody Flack and Sara Makenzie are transgender Wisconsin Medicaid beneficiaries diagnosed with gender dysphoria.¹ (Dkt. 1 ¶¶ 1, 55–57, 81–84.) They challenge a state regulation, Wis. Admin. Code § DHS 107.03(23) & (24), that excludes from Medicaid coverage “[t]ranssexual surgery” and “[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics.” (Dkt. 1 ¶ 2.) Among other relief, Plaintiffs seek a permanent injunction against Defendants enjoining enforcement of the rule and “directing [DHS] to provide Medicaid coverage for all medically necessary care, including surgical treatments, necessary for the treatment of gender dysphoria.” (Dkt. 1:30 ¶ A.)

2. On May 23, 2018, Plaintiffs filed a motion for preliminary injunction enjoining enforcement of the rule. (Dkt. 18; Dkt. 1:30 ¶ A.) Along with a motion (Dkt. 18), brief (Dkt. 19), and proposed findings of fact (Dkt. 20), Plaintiffs filed the following materials: a declaration of counsel with twenty-four exhibits (Dkt. 21:1–24); declarations of Plaintiffs (Dkt. 22–23); an expert witness report of a licensed psychologist (23 pages) (Dkt. 24); declarations of six M.D.’s (Dkt. 25; 27; 29; 31–33); a declaration of a PhD. (Dkt. 26), a

¹ The facts referenced in this motion are taken from Plaintiffs’ Complaint. (Dkt. 1.) These facts are taken as true only for the purpose of this motion.

declaration of a psychotherapist (Dkt. 28); a declaration of an M.D./PhD. (Dkt. 30).

3. In response to Plaintiffs' motion for preliminary injunction, in a text-only order dated May 24, 2018, this Court set the deadline for DHS's brief in opposition as June 14, 2018, and also set the injunction hearing for June 27, 2018, at 2:30 p.m. (Text Only Order, May 24, 2018.)

4. The relief Plaintiffs seek is broad—enjoining enforcement of the Medicaid rule as to all Medicaid beneficiaries during the pendency of this case. (Dkt. 19:9, 49–50.) If the Court grants them a preliminary injunction, Plaintiffs intend to undergo irreversible medical procedures for which Wisconsin Medicaid must pay. Specifically, Plaintiff Flack seeks a double mastectomy and male chest reconstruction (Dkt. 19:17) and Plaintiff Makenzie seeks a genital reconstruction in the form of a bilateral orchiectomy and vaginoplasty. (Dkt. 19:20).

5. Thus, Plaintiffs seek to obtain the ultimate relief in this case as to themselves through this motion for preliminary injunction. And based on the Court's text-only order, DHS must raise its defense—responding to a lengthy brief, multiple proposed findings of facts, and expert and non-expert medical testimony—within three weeks of service of the motion for preliminary injunction. At least a year's-worth of litigation, therefore, is being squeezed into a one month period of time. For the purpose of fairness, DHS therefore

respectfully seeks an order from this Court amending the scheduling order to allow it to have a reasonable amount of time to prepare its defense.

6. Not only is DHS at a disadvantage as to the slight amount of time available to mount its defense, it must do so with attorneys who are significantly occupied with another case during this time.

7. In this case DHS is represented by Attorney General of Wisconsin Brad D. Schimel and three assistant attorneys general of the Wisconsin Department of Justice (DOJ): Steven C. Kilpatrick, Jody J. Schmelzer, and Colin T. Roth. (Dkt. 15–17.)

8. As this Court is aware, there is another case before this Court concerning transgender health insurance coverage—*Boyden v. ETF*, No. 17-cv-00254-wmc. The *Boyden* defendants are also represented by Schimel, and Kilpatrick, Schmelzer, and Roth.² *Boyden* concerns two transgender state employees suing several state entities and officials seeking a change in the State Group Health Insurance Plan and Uniform Benefits.³ The *Boyden* plaintiffs challenge an exclusion of coverage of “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment.”⁴

² *Boyden v. ETF*, No. 17-cv-264 (W.D. Wis.), Dkt. 22; 23; 60.

³ *Boyden*, No. 17-cv-264, Dkt. 27 ¶¶ 1, 10–12; Dkt. 67.

⁴ *Boyden*, No. 17-cv-264, Dkt. 27 ¶¶ 8.

9. The *Boyden* case will become very busy during the next several weeks—exactly the same time DHS’s opposition brief in the instant case is to the Court is due and the injunction hearing is scheduled. This conflict will prevent DHS’s counsel to devote sufficient time and energy to its defense.

10. First, under the current scheduling order in *Boyden*, the parties’ dispositive motions deadline is June 8, 2016.⁵ The *Boyden* defendants intend to file a dispositive motion on or before this deadline—meaning that counsel will be working on that motion until that date, less than one week before DHS’s opposition to the instant preliminary injunction motion is due. Moreover, if the *Boyden* plaintiffs file a motion for summary judgment no later than June 8, the *Boyden* defendants will have to file a response due within 21 days—that is, June 29—a mere two days after the injunction hearing date occurs in the instant case.

11. Second, in addition to dispositive motions work, counsel on both sides in *Boyden* have agreed to schedule two expert witness depositions—one in Connecticut and one in California—for June 15. This results in counsel traveling on June 13, thereby being out of state on the date set for DHS’s opposition brief to the preliminary injunction motion.

⁵ *Boyden*, No. 17-cv-264, Dkt. Text Only Order, May 4, 2018; Dkt. 61.

12. Third, to further add to the work in *Boyden*, on Friday, May 25, the plaintiffs filed a motion for leave to file a second amended complaint,⁶ to which the defendants intend to file an opposition very shortly.

13. Fourth, depending upon the Court's decision to the *Boyden* plaintiffs' motion for leave to file a second amended complaint, the *Boyden* defendants may be required to file a responsive pleading within 14 days of that decision pursuant to Rule 15(a)(3) the Federal Rules of Civil Procedure. All of the *Boyden* litigation cuts into the time necessary for DHS counsel to prepare a response to the opposition brief and prepare for the injunction hearing in the instant case.

14. Finally, the next month finds AAG Schmelzer out of the office for several days. More precisely, Schmelzer is scheduled to be out of the office from June 14 through June 22 on a long-planned family vacation. During most of this time she will be out of the country and unable to work on either the *Boyden* case or the instant case.

15. The three AAGs representing DHS and the *Boyden* defendants work within DOJ's Special Litigation and Appeals Unit. This unit is dedicated to defending complex litigation, including constitutional challenges to state

⁶ *Boyden*, No. 17-cv-264, Dkt. 74.

law.⁷ These AAGs, because of their work in *Boyden*, are currently the only attorneys within DOJ familiar with the unique subject matter and legal issues governing the instant case. Moreover, the Special Litigation and Appeals Unit is currently short-staffed—without two of its attorneys. Accordingly, it would be impractical for the Attorney General to assign AAGs other than Kilpatrick, Schmelzer, and Roth to defend DHS in this instant case on such a fast-track schedule.

16. Further support for amending the current scheduling order, but without directly addressing the irreparable harm requirement of Plaintiffs' motion for preliminary injunction, is that a one-month delay in addressing the motion would not appear to significantly harm Plaintiffs. That is because, despite filing the motion for immediate injunctive relief, Plaintiff Flack's Medicaid claim was denied several months ago—in November 2017—and Makenzie does not allege that she even made a claim to Medicaid (although she alleges that one of her doctors informed her back in February 2018 that Medicaid would not cover the procedure she seeks). (Dkt. 19:17, 21.)

17. In sum, this Court's May 24 scheduling order does not provide DHS with a fair or reasonable amount of time for its counsel to raise a proper defense to Plaintiffs' preliminary injunction motion. Therefore, DHS

⁷ See <https://www.doj.state.wi.us/dls/special-litigation-appeals-unit> (last visited May 31, 2018).

respectfully asks this Court to amend its scheduling order to set a preliminary injunction hearing date for August 15, 2018, and an opposition brief deadline for July 31, 2018.

18. No brief accompanies this motion.

Dated this 31st day of May, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

JODY J. SCHMELZER
Assistant Attorney General
State Bar #1027796

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 266-3094 (JJS)
(608) 264-6219 (CTR)
(608) 267-2223 (Fax)
kilpatricksc@doj.state.wi.us
schmelzerjj@doj.state.wi.us
rothct@doj.state.wi.us