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' REPORT REGARDING THE COSTS OF REMOVING THE EXCLUSION FOR ALL MEDICAID BENEFICIARIES

Pursuant to this Court's request at the preliminary injunction hearing held on July 19, 2018, the Defendants Wisconsin Department of Health Services (DHS) and Linda Seemeyer submit this report on the potential cost to the State of removing the Medicaid coverage exclusion at issue in this case (the "Exclusion").

I. This Court should reconsider its inclination to grant injunctive relief in favor of all potential Medicaid beneficiaries.

On May 31, 2018, Defendants requested more time to oppose Plaintiffs' preliminary injunction motion in order to, among other things, prepare an

expert report regarding the potential cost to the State of removing the Exclusion. (Dkt. 35:3–4 ¶¶ 4–5 (noting Plaintiffs seek to enjoin "enforcement of the Medicaid rule as to all Medicaid beneficiaries" and explaining Defendants' need for a "reasonable amount of time to prepare its defense").) More generally, Defendants needed more time to assess the potential effect on Wisconsin's Medicaid program of removing the Exclusion as to all potential beneficiaries.

Rather than grant Defendants' request for a new deadline sufficient to accommodate their needs, this Court urged Plaintiffs to limit their request for injunctive relief to the two named plaintiffs, and Plaintiffs agreed:

> THE COURT: The only thing I'm considering right now is the motion to amend the scheduling order, and if your position is that you want to proceed as to all potential beneficiaries . . . for preliminary injunction . . . , then I don't know how I don't grant a substantial extension of time to the State. But if you were to say to me that you'll limit it to the named plaintiffs, who, by the way, are the only ones who have documented having immediate impacts, . . . then I'd be less sympathetic to a substantial extension of time by the State.
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> MR. WARDENSKI: Your Honor, we are willing to limit the relief to the two plaintiffs in this case for the preliminary injunction motion . . . .
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> THE COURT: All right. Then that goes back to defendants, because with those two narrowing positions, I'm not sure what really is required that the work hasn't already been done. . . . [Y]ou ought to be able to put together a reasonable response much sooner than the end of August with those two narrowing conditions.

(Dkt. 52 (Hrg. Tr. 8:18–9:23).)

Given that understanding, Defendants did not conduct an expert analysis of the type this Court has now requested or a broader analysis of the effect of removing the Exclusion. Since Defendants did not anticipate that this Court would consider granting preliminary injunctive relief as to all potential Medicaid beneficiaries, they decided to conserve resources and not evaluate at this early stage the potential cost and other issues associated with such broad injunctive relief. That analysis would require costly and detailed expert work that cannot be completed within a day. Nor can DHS supply a reliable cost analysis itself, as it has inadequate data regarding the possible utilization rates of surgical gender reassignment procedures. Past DHS data would show lower attempted utilization rates than would be expected after removing the Exclusion, since Medicaid beneficiaries could now expect coverage and would likely attempt to use the affected services more often.

Since Defendants cannot complete on short notice a report regarding the potential cost to the State of removing the Exclusion, and given the parties' agreed-upon understanding of the narrowed scope of the preliminary injunction request, Defendants respectfully request that this Court limit the scope of the contemplated injunction to the named plaintiffs, only.

II. Alternatively, Defendants should be granted 30 days to evaluate the impact of removing the Exclusion as to all potential Medicaid beneficiaries.

If this Court is not inclined to limit the injunction's scope, Defendants respectfully request 30 days to analyze the potential impact on Wisconsin's Medicaid program of removing the Exclusion, before this Court rules on Plaintiffs' preliminary injunction motion. This additional time would allow Defendants to prepare a complete cost report and conduct any other necessary analyses of the potential impacts of a broad injunction.

This extra time is necessary because Defendants did not contest the balancing of the harms element, a litigation decision that rested on the understanding that Plaintiffs' preliminary injunctive relief would be limited to the two named plaintiffs. (Dkt. 53:47 n.9.) But paying for two specific medical procedures of two beneficiaries obviously imposes a much smaller hardship than paying for all surgical sex reassignment procedures from a much larger population. Now that any preliminary injunctive relief the Court may grant may extend to all Wisconsin Medicaid beneficiaries, Defendants must contest the "balancing of harms" element. With an extra 30 days to conduct these additional analyses, Defendants could argue the balance of hardships more effectively than on the current limited record which, again, was created on the understanding that relief would be limited to the two named plaintiffs.

III. The existing record still shows that the balance of hardships tips in Defendants' favor.

If this Court does not limit the injunction's scope or grant Defendants more time, Defendants still contend that the balance of harms tips in their favor. This analysis examines whether "the balance of harms favors [the plaintiffs] or whether the harm to other parties or the public is sufficiently weighty that the injunction should be denied." *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1058 (7th Cir. 2016).

First, removing the Exclusion for all potential Medicaid beneficiaries would impose a meaningful cost. As explained more in Defendants' preliminary injunction opposition brief (Dkt. 53:10–11), David Williams' expert report—from a different yet similar other case before this Court—allows for a rough estimate of the costs of removing the Exclusion as to all Wisconsin Medicaid beneficiaries. Of course, caution must be used in applying that report here—the utilization rates for affected procedures might be different for the Medicaid population than for state employees, and Medicaid reimbursement rates might differ from those offered by state employees'

private health plans.[1] With those caveats, Williams' estimate provides a rough measure of the potential costs at issue here: roughly $2.1 million per year. (Dkt. 53:10–11; 55-5.) Plaintiffs rightly note that federal Medicaid reimbursements would likely cover around half of those costs (Dkt. 62:8), but Wisconsin taxpayers would still bear a portion of that federal reimbursement through their federal taxes.

Plaintiffs argue that Defendants face no irreparable harm (Dkt. 19:47–48), but it is unclear how Defendants could ever recoup the costs it would pay for coverage over the course of this litigation, if they ultimately prevail. And Plaintiffs also concede that "[t]he State's potential budgetary concerns are entitled to . . . consideration." (Dkt. 19:48 (citing *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 611 (7th Cir. 2012)).) Unlike in *Bontrager*, this budgetary concern outweighs Plaintiffs' purported harms for the additional reasons discussed below.

[1] That said, Plaintiffs significantly underestimate the reimbursement rates for Mr. Flack's requested surgeries in their preliminary injunction reply brief, since the amount they cite only covers physician fees. (Dkt. 62:8 n.6.) Other fees—for example, facility fees—would be billed separately and result in a higher per-procedure cost. DHS itself estimated that the two surgical procedures Flack seeks would cost around $20,000: $7,113.00 for a mastectomy and $12,118.50 for breast reconstruction. (Dkt. 21-19:2–3.)

The procedures Plaintiffs seek also carry a meaningful risk of adverse side effects (Dkt. 55-6 at 62–64), which places Defendants in the undesirable position of being forced to provide insurance to a large population to cover unproven treatments with a meaningful risk of harm. That is unlike *Bontrager*, where no debate existed over the routine dental services at issue. *Id.* at 606. Defendants' core mission of advancing public health would be compromised by providing such coverage (*see* Wis. Stat. § 250.03(1)), a significant irreparable harm that outweighs the harm Plaintiffs might suffer by being denied coverage as this case proceeds.

Lastly, Defendants would be irreparably harmed by the mere fact of being prevented from enforcing a constitutionally-valid law. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (noting that "the government presumably would be substantially harmed if enforcement of a constitutional law . . . were enjoined"). Plaintiffs have shown, at best, *some* likelihood of success on the merits. But that is not a better-than-half chance, which still implies that Defendants will be forbidden from enforcing a valid regulation during this lawsuit's pendency.

On Plaintiffs' side of the ledger, this Court indicated its inclination to find irreparable harm in Plaintiffs' ongoing psychological distress. But Plaintiffs lack good evidence to show that the treatments they seek will effectively treat their gender dysphoria. (Dkt. 53:7–10.) Indeed, Plaintiffs

continue to suffer psychological distress, even *after* the multiple gender dysphoria treatments they have already received. (Dkt. 22:3–4 ¶¶ 11, 13–14; Dkt. 23:3, 5 ¶¶ 13, 21, 23.) It is unlikely that enjoining the Exclusion will mitigate the purported irreparable harm they will suffer much, if at all.

This case can be contrasted to *K.G. ex rel. Garrido v. Dudek*, 839 F. Supp. 2d 1254, 1268 (S.D. Fla. 2011), which also concerned a preliminary injunction to provide Medicaid coverage. There, the state argued that the balance of harms tipped in its favor because the relief would require it to provide coverage to all persons situated similarly to the named plaintiffs, a costly prospect. But the court disagreed, since the preliminary injunctive relief would only guarantee Medicaid coverage to the named plaintiff, not all potential beneficiaries in the state. Here, however, this Court's contemplated order will require Defendants to provide coverage for *all* potential Medicaid beneficiaries, none of whom, except for the named plaintiffs, have presented any evidence of irreparable harm to this Court. (Dkt. 52 (Hrg. Tr. 9:1–3 (this Court noted that "the named plaintiffs . . . are the only ones who have documented having immediate impacts")).) *Dudek* implies that the balance of hardships tips in a state's favor, when the injunction runs in favor of all potential Medicaid beneficiaries rather than just the named plaintiff(s).

CONCLUSION

Defendants respectfully request that this Court limit the scope of any injunction to the named plaintiffs or, alternatively, give Defendants 30 days to prepare a cost report regarding the potential cost to the State of removing the Exclusion. If this Court declines both requests, Defendants offer the rough estimate of $2.1 million a year based on David Williams' analysis. Using that number and considering other factors, the balance of harms tips in Defendants' favor and Plaintiffs' requested preliminary injunction should be denied.

Dated this 20th day of July, 2018.

Respectfully submitted,

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