

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN

CODY FLACK and  
SARA ANN MAKENZIE,

Plaintiffs,

v.

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

Defendants.

Case No. 3:18-cv-00309-wmc  
Judge William Conley

**PLAINTIFFS' RESPONSE TO DEFENDANTS' REPORT REGARDING  
TIME TO DETERMINE PLAINTIFFS' PRIOR AUTHORIZATION REQUESTS**

Plaintiffs Cody Flack and Sara Ann Makenzie respond to Defendants' Report Regarding Time to Determine Plaintiffs' Prior Authorization Requests for Services Covered by the Challenged Exclusion [Dkt. No. 64] ("Report") as follows:

**1. Plaintiff Cody Flack**

In their report, Defendants request ten business days to issue a decision on the July 18, 2017 prior authorization request ("Request") from Dr. Clifford King, the surgeon who would perform Mr. Flack's double mastectomy and chest reconstruction surgeries. Because DHS is already in the possession of Mr. Flack's complete medical records since the submission of the Request, Plaintiffs ask the Court to order DHS to issue a decision within ten *calendar* days of a preliminary injunction. Mr. Flack tentatively scheduled surgery with Dr. King for September 5, 2018 in the event an injunction were to issue. If he is unable to keep that date because of further delays in DHS's approval of his prior authorization request, he anticipates that he would be

unable to reschedule surgery for at least three months given Dr. King's schedule, and therefore asks for expedited review and approval of his request. Plaintiffs have produced the following medical records for Mr. Flack reflecting his medical care from July 18, 2017 (the date Dr. King's prior authorization request was submitted) to present:

- Declaration of Daniel Bergman, Mr. Flack's treating therapist, dated May 14, 2018 [Dkt. No. 28] stating his support for Mr. Flack's surgery and his opinion that this surgery is medically necessary for Mr. Flack; and all of Mr. Flack's medical records from Mr. Bergman from October 21, 2015 to July 10, 2018;
- Declaration from Dr. Amy DeGueme, Mr. Flack's treating endocrinologist [Dkt. No. 29], dated May 14, 2018, stating her support for Mr. Flack's surgery and her opinion that this surgery is medically necessary for Mr. Flack, and all of Mr. Flack's medical records from Dr. DeGueme from August 15, 2016 to April 19, 2018;
- Declaration from Dr. Clifford King, the surgeon who will perform Mr. Flack's surgery, dated May 21, 2018 [Dkt. No. 30], stating that Mr. Flack meets the criteria for surgery under the WPATH standards of care and that he remains willing to schedule and perform the surgery if the July 18, 2017 prior authorization request is granted, and all of Mr. Flack's medical records from Dr. King from March 24, 2017 to February 13, 2018;
- Declaration from Dr. Stephanie Budge, a clinical psychologist who independently evaluated Mr. Flack in May 2018, dated May 15, 2018 [Dkt. No. 24], stating her opinion that Mr. Flack's surgery is medically necessary to treat his gender dysphoria.
- All of Mr. Flack's medical records from Prevea Health (including records from all of his primary care physicians and the physician who performed his previous surgery) from January 6, 2014 to March 30, 2018;

Based on these documents, which confirm Mr. Flack's eligibility and readiness for surgery, DHS has sufficient information in its current possession to make a decision on Mr. Flack's prior authorization request within 10 calendar days. Plaintiffs object to Defendants' request that they re-submit medical records to DHS as part of the review process since DHS, as a party to this suit, is already in the possession of all potentially relevant and current medical records for Mr. Flack.

**2. Plaintiff Sara Ann Makenzie**

Plaintiffs consent to the proposal that DHS make a decision on her anticipated prior authorization request for genital reconstruction surgery that she has requested from her treating surgeon, Dr. Katherine Gast, no later than 10 business days after the receipt of any appeal of a denial of coverage by the third-party HMO through which Ms. Makenzie receives her Medicaid coverage. Because the HMO will make, and may approve, the initial review of Ms. Makenzie's request, Plaintiffs request that DHS promptly provide a copy of the court-ordered injunction to Ms. Makenzie's HMO stating that the Challenged Exclusion does not apply to Ms. Makenzie's request for genital reconstruction surgery and asking the HMO for a decision on Ms. Makenzie's request within ten business days.<sup>1</sup>

**3. Applicable Standards of Care**

Pursuant to the Wisconsin Medicaid regulations requiring that medical services be provided "in conformity with generally accepted good medical practice," Wis. Adm. Code § DHS 107.06(1) (defining covered physician services), Plaintiffs ask that the Court order DHS to approve Mr. Flack and Ms. Makenzie's requests for surgery if they meet the applicable standards of care for their requested procedures under WPATH Standards of Care, the internationally-accepted standards that both Dr. King and Dr. Gast apply in determining patients' eligibility for surgery, and not impose requirements more stringent than those contained in the WPATH Standards of Care to either Plaintiff.

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<sup>1</sup> Plaintiffs have also produced all of Ms. Makenzie's medical records from her treating physicians and therapist through June 2018, which should permit expedited review.

Plaintiffs further request that, should an injunction issue, the Court order the Parties to submit status reports on September 14, 2018 providing the status of Defendants' compliance with the injunction and Plaintiffs' requests for coverage for their requested surgeries.

Dated: July 20, 2018

Respectfully submitted,

/s/ Joseph J. Wardenski

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