

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

CODY FLACK,
SARA ANN MAKENZIE,
MARIE KELLY, and
COURTNEY SHERWIN,

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' SUPPLEMENTAL STATEMENT OF PROPOSED FACTS
IN SUPPORT OF MOTION TO MODIFY PRELIMINARY INJUNCTION**

Pursuant to this Court's local procedures for motions for injunctive relief, Plaintiffs respectfully submit this Supplemental Statement of Proposed Facts ("Supplemental Statement") in support of their Motion to Modify Preliminary Injunction [Dkt. No. 107] (the "Motion"). This Supplemental Statement supplements Plaintiffs' original Statement of Proposed Facts in Support of Motion for Preliminary Injunction [Dkt. No. 20]. The proposed facts cite, where appropriate, declarations and their attached exhibits filed previously in this case or concurrently with this Motion.

Estimated Fiscal Impact of Enjoining the Challenged Exclusion

1. Defendants' expert, David V. Williams, estimates that approximately 63 of Wisconsin Medicaid's 1.2 million beneficiaries (0.005 percent) would seek Medicaid coverage for some form of gender-confirming surgery in a given year, at an estimated annual cost to the State of Wisconsin of approximately \$300,000, representing approximately 0.008 percent of Wisconsin's approximately \$3.9 billion share of its annual Medicaid expenditures. Report of David V. Williams at 3 [Dkt. No. 74-1]; Supp. Decl. of Jaclyn White Hughto, PhD, MPH ¶¶ 6, 8 [Dkt. No. 96] ("Hughto Supp. Decl.").

2. Increased availability of gender-confirming care has resulted in cost savings from reductions in negative health outcomes associated with untreated gender dysphoria, including depression, suicidality, drug abuse, HIV infection, mortality, and costs related to physical and sexual assault. Hughto Supp. Decl. ¶¶ 10-20.

3. The Williams Report's estimate did not account for any cost savings to Wisconsin Medicaid resulting from covering medically necessary treatments for gender dysphoria. *See generally* Williams Report; *see also* Hughto Supp. Decl. ¶¶ 8, 23.

Named Plaintiff Marie Kelly

4. Marie Kelly is a 38-year-old transgender woman who lives in Milwaukee, Wisconsin. Decl. of Marie C. Kelly ¶¶ 2, 3 [Dkt. No. 93] ("Kelly Decl.").

5. Ms. Kelly has a diagnosis of gender dysphoria. *Id.* ¶ 4.

6. Ms. Kelly has been enrolled in Wisconsin Medicaid, which she relies on for her health care needs, since approximately 2014. *Id.* ¶ 5.

7. Ms. Kelly was assigned male at birth, but she has a female gender identity and has known herself to be female for nearly all of her life. *Id.* ¶¶ 3, 6.

8. Ms. Kelly has lived fully in accordance with her female gender identity since 2010. *Id.* ¶¶ 3, 9.

9. To further her gender transition and treat her gender dysphoria, Ms. Kelly has taken feminizing hormone treatments under the supervision of her primary care providers since 2011. *Id.* ¶ 12.

10. Although the hormone treatments have helped reduce Ms. Kelly's gender dysphoria, she still experiences exacerbated symptoms of gender dysphoria and daily anxiety related to her male-appearing genitalia, male-appearing chest, and facial hair. *Id.* ¶¶ 12, 14-17.

11. Ms. Kelly is seeking Wisconsin Medicaid coverage for gender-confirming surgical treatments, including female genital reconstruction (orchiectomy and vaginoplasty), female chest reconstruction, and electrolysis for facial hair removal, to further her gender transition and treat her daily symptoms of gender dysphoria and related anxiety and distress. *Id.* ¶ 18.

12. Ms. Kelly's medical providers have determined that female genital reconstruction, female chest reconstruction, and electrolysis for facial hair removal are medically necessary treatments for her gender dysphoria. *Id.*; Decl. of Linda Wesp, MSN, RN, APNP, FNP-C, AAHIV-S ¶ 14 ("Wesp. Decl.").

13. Ms. Kelly has inquired with her Wisconsin Medicaid managed care organizations several times over the years, including as recently as August 2018 with her current Wisconsin Medicaid managed care organization, about whether Wisconsin Medicaid would cover gender-confirming procedures. Kelly Decl. ¶¶ 19-20. She has been told each time she inquired that these procedures are not covered because of the Challenged Exclusion. *Id.*

14. Because Ms. Kelly cannot afford to pay for gender-confirming procedures herself, she is currently unable to obtain those or any gender-confirming surgeries and is suffering ongoing gender dysphoria as a result. *Id.* ¶¶ 20-21.

Named Plaintiff Courtney Sherwin

15. Courtney Sherwin is a 35-year-old transgender woman who lives in Janesville, Wisconsin. Decl. of Courtney Sherwin ¶¶ 2-3 [Dkt. No. 95].

16. Ms. Sherwin has been on Wisconsin Medicaid for about two years and relies on it for her health care needs. *Id.* ¶ 4.

17. Ms. Sherwin has been diagnosed with gender dysphoria and has been denied Wisconsin Medicaid coverage for treatments for gender dysphoria because of the Challenged Exclusion. *Id.* ¶¶ 5, 13, 18, 26, 28-29.

18. Ms. Sherwin, who was assigned male at birth, has known herself to be female since around age 10. *Id.* ¶ 3, 6.

19. Ms. Sherwin came out as transgender in late 2017 and began her gender transition in early 2018, at which time she began living full-time as a woman. *Id.* ¶ 6.

20. Before coming out as transgender, Ms. Sherwin suffered significant gender dysphoria (including anxiety, depression, stress, and suicidal ideation) resulting from the incongruence resulting from her identity as a woman and being perceived as a man by others. *Id.* ¶ 8.

21. After coming out as transgender and starting her gender transition, Ms. Sherwin began wearing traditionally women's clothing, began using the name Courtney instead of her traditionally male birth name, and started a medical transition to further her transition and treat her gender dysphoria. *Id.* ¶ 9.

22. Since March 2018, Ms. Sherwin has taken feminizing hormone treatments under the care of her primary care doctor. *Id.* ¶ 11.

23. Wisconsin Medicaid does not cover several of Ms. Sherwin's hormone medications and she has been forced to pay out-of-pocket for them. *Id.* ¶ 13.

24. While the hormone treatments have reduced Ms. Sherwin's gender dysphoria, she continues to experience significant dysphoria related to her masculine voice and her male-appearing chest, genitals, and facial hair. *Id.* ¶¶ 10, 12, 19, 21, 23.

25. Ms. Sherwin's medical providers have determined that gender-confirming surgeries, including genital reconstruction, chest reconstruction, and voice therapy are medically necessary treatments for her gender dysphoria. *Id.* ¶¶ 16-17, 22, 26-27.

26. Ms. Sherwin's providers have determined that her need for an orchiectomy, a gender-confirming surgery that would stop her body's natural production of testosterone, is particularly urgent as it is medically necessary for her because of her gender dysphoria, and to prevent the adverse and dangerous side effects she experiences from one of her hormone treatments, the testosterone blocker spironolactone. *Id.* ¶¶ 14-17.

27. Notwithstanding Ms. Sherwin's doctors' recommendations that she obtain an orchiectomy and voice therapy, Wisconsin Medicaid has denied her coverage for both based on the Challenged Exclusion. *Id.* ¶¶ 18, 26, 29.

28. Ms. Sherwin also plans to seek genital and chest reconstruction surgeries, but expects that coverage for those surgeries will also be denied pursuant to the exclusion. *Id.* ¶¶ 22, 32-33.

29. Because Ms. Sherwin cannot afford these treatments herself, she is experiencing significant gender dysphoria and consequences of that dysphoria, including social anxiety, adverse physical health symptoms, and other distress. *Id.* ¶¶ 19-21, 23-25, 30-31, 33.

Other Facts

30. In addition to the Named Plaintiffs, other transgender Wisconsin Medicaid beneficiaries with gender dysphoria are being denied coverage for gender-confirming surgeries pursuant to the Challenged Exclusion. *See, e.g.*, Decl. of Lexie Vordermann ¶¶ 9-12, 14 [Dkt. No. 99]; Decl. of Tori Vancil ¶ 14 [Dkt. No. 97]; Decl. of Emma Grunenwald-Ries ¶ 18 [Dkt. No. 98]; Wesp Decl. ¶¶ 13, 16; Decl. of Kathy Oriel, MD, MS ¶¶ 13, 14 (“Oriel Decl.”).

31. The Challenged Exclusion prevents medical providers in Wisconsin from providing clinically appropriate, adequate treatments for gender dysphoria to their transgender patients by categorically denying coverage for necessary care to those patients. Wesp Decl. ¶ 16; Oriel Decl. ¶ 14.

Dated: October 25, 2018

Respectfully submitted,

/s/ Joseph J. Wardenski

Joseph J. Wardenski

Jennifer I. Klar

Orly T. May

Alexa T. Milton

RELMAN, DANE & COLFAX PLLC

1223 19th Street, NW, Suite 600

Washington, DC 20036

Telephone: (202) 728-1888

Facsimile: (202) 728-0848

jwardenski@relmanlaw.com

jklar@relmanlaw.com

omay@relmanlaw.com

Robert Theine Pledl
Mark A. Peterson
Daniel A. Peterson
MCNALLY PETERSON, S.C.
1233 North Mayfair Road, Suite 200
Milwaukee, WI 53226-3255
Telephone: (414) 257-3399
Facsimile: (414) 257-3223
rpled1@mcpetelaw.com
mpeterson@mcpetelaw.com
dpeterson@mcpetelaw.com

Abigail Coursolle
Catherine McKee
NATIONAL HEALTH LAW PROGRAM
200 N. Greensboro Street, Suite D-13
Carrboro, NC 27510
Telephone: (919) 968-6308
Facsimile: (919) 968-8855
coursolle@healthlaw.org
mckee@healthlaw.org

Attorneys for Plaintiffs