

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

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

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.

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

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Defendants Wisconsin Department of Health Services and Linda Seemeyer, in her official capacity as Secretary of the Wisconsin Department of Health Services (DHS), hereby move this Court for an order amending its text-only order, dated October 26, 2018, concerning Plaintiffs' motion to amend their preliminary injunction. (Dkt. 107.) That text-only order set the deadline for Defendants' response as October 31, 2018. Defendants respectfully seek an order setting the deadline for their response to November 16, 2018. The grounds for this motion are as follows.

1. Plaintiffs Cody Flack, Sara Makenzie, Marie Kelly, and Courtney Sherwin are transgender Wisconsin Medicaid beneficiaries diagnosed with gender dysphoria. (Dkt. 85 ¶ 1.) 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. 85 ¶ 3.) Among other relief, Plaintiffs seek, on behalf of them and all other similarly situated individuals, preliminary and permanent injunctions 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. 85:41 ¶ C.)

2. On August 24, 2018, this court issued the preliminary injunction sought only as to plaintiffs Cody Flack and Sarah Ann Makenzie. Rather than expand the injunction to cover all potential Medicaid beneficiaries, the Court limited the injunction to only those two plaintiffs.

3. On September 25, 2018, Plaintiffs filed an amended complaint adding two new named plaintiffs and class action allegations. (Dkt. 85 ¶¶ 101–133, 141–149.)

4. On October 18, 2018, Plaintiffs filed a motion for class certification. (Dkt. 89.) Defendants' response brief will be timely filed by November 8, 2018, and Plaintiffs' brief in reply is due no later than November 19, 2018.

5. After the close of business hours on October 25, 2018, Plaintiffs filed a motion to expand the preliminary injunction to cover the two new named plaintiffs and all other members of the putative class proposed in their October 18 class certification motion. (Dkt. 107.) That motion is accompanied by a 31 page brief (Dkt. 108), a new expert declaration (Dkt. 109), and a supplemental statement of proposed facts (Dkt. 110).

6. The morning of October 26, 2018, this Court issued a text-only order setting Defendants' response deadline to the preliminary injunction motion as October 31, 2018, giving Defendants only four business days to respond.

7. Defendants cannot adequately respond to Plaintiffs' motion in four business days for a number of reasons.

8. Plaintiffs' preliminary injunction brief argues that they are entitled to an expanded injunction on the basis of their Medicaid Act claims under 42 U.S.C. § 1396a(a)(10)(A)–(B). (Dkt. 108:29–35.) But, earlier in this case and at this Court's urging, Plaintiffs agreed to resolve their preliminary injunction request without addressing their Medicaid Act claims. (6/5/2018 Hrg. Tr. 8:17–9:14.) On this understanding, Defendants have not been

preparing a defense to the preliminary injunction motion as to the Medicaid Act claims. Analyzing and preparing a response to these new issues will require a reasonable amount of time.

9. Plaintiffs' motion rests in part on allegations regarding two new named plaintiffs. (Dkt. 108:14–17.) But Plaintiffs have not supplied Defendants with any certified medical records regarding these individuals, and so Defendants do not have any basis to evaluate their assertions that the treatments they seek are medically necessary and appropriate. As part of the first round of preliminary injunction briefing, Defendants received medical records for both named plaintiffs and consulted a medical expert to evaluate those records. That expert ultimately submitted a report in support of Defendants' response. (Dkt. 56.) With only four business days until Defendants' response is due, and without medical records at this time, it will be effectively impossible to evaluate and, if necessary, contest the new named plaintiffs' allegations.

10. Likewise, Plaintiffs' motion also rests in part on allegations regarding other putative class members. (Dkt. 108:18–20.) For the same reasons discussed above, it will be practically impossible to evaluate and, if necessary, contest those new allegations in the next three business days.

11. Plaintiffs' motion also rests on a new expert declaration from Dr. Kathy Oriol. (Dkt. 109.) Four business days is not sufficient to evaluate this

new expert declaration and potentially obtain a response from their own expert, if necessary.

12. Plaintiffs have written a detailed 31-page brief in support of the expanded injunction—and they have effectively had since the day this Court issued the original injunction to draft that brief. Allotting Defendants only four business days to respond to Plaintiffs’ brief under these circumstances would be inequitable.

13. One of Defendants’ three trial counsel—Jody Schmelzer—had a pre-planned vacation on October 26, 2018, leaving the team unexpectedly short-handed when this motion was set for a four-day deadline.

14. Given the complex issues presented by Plaintiffs’ motion and the short deadline, it would be impractical to assign additional Department of Justice attorneys to the case on such short notice.

15. Setting aside the prejudice to Defendants of this short deadline, allowing Defendants more time to respond would make sense given the broader procedural posture of this case.

16. The very reason Plaintiffs did not immediately seek to expand the preliminary injunction is because they did not have a certified class, and Defendants’ position is that the Court lacks authority to expand the injunction without one. (Dkt. 73, 78.) But Plaintiffs still do not have a certified class. The parties have not yet fully briefed Plaintiffs’ class certification motion, and will

not do so until November 19, 2018. Since that motion will not be resolved before then, and since the injunction cannot be expanded until it is resolved, it would not delay the proceedings to allow Defendants more time to respond to the preliminary injunction motion.

17. Moreover, this case involves important and novel issues of constitutional and statutory law that may ultimately be considered by the Supreme Court. It is important to build an adequate record at the trial level to enable effective appellate review. Granting Defendants only four business days to respond to an important motion does not serve that end.

18. Lastly, granting a three-week extension should not unduly prejudice Plaintiffs. After receiving the Court's leave on August 31, 2018, to file an amended complaint with class action allegations, they waited until September 25, 2018 to do so—nearly a month later, and only three days before the September 28, 2018 deadline. (Dkt. 82, 85.) Then, they waited over three more weeks to file their motion for class certification on October 18, 2018, and then another week after that to file their motion for an expanded preliminary injunction. (Dkt. 89, 107.) Granting Defendants an additional three weeks to respond to the preliminary injunction motion should not prejudice Plaintiffs any more than the delay in their own filings.

Accordingly, Defendants respectfully request that this Court enter an order re-setting the deadline for their response to Plaintiffs' expanded preliminary injunction motion to November 16, 2018.

Dated this 26th day of October, 2018.

Respectfully submitted,

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Attorney General of Wisconsin

Electronically signed by:

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