

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CODY FLACK and SARA ANN MAKENZIE,

Plaintiffs,

-vs-

Case No. 18-CV-309-WMC

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

Madison, Wisconsin
June 5, 2018
11:02 a.m.

Defendants.

STENOGRAPHIC TRANSCRIPT OF TELEPHONIC MOTION HEARING
HELD BEFORE U.S. DISTRICT JUDGE WILLIAM M. CONLEY

APPEARANCES:

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13 (Proceedings called to order at 11:02 a.m.)

14 THE COURT: Hello. This is Judge Conley. I am calling
15 Case No. 18-CV-309, *Flack, et al. v. Wisconsin Department of*
16 *Health Services, et al.*

17 I'll hear appearances for the plaintiffs.

18 MR. WARDENSKI: Good morning, Your Honor. This is
19 Joseph Wardenski from Relman, Dane & Colfax for plaintiff. I'm
20 here with my colleagues Jennifer Klar and Orly May from Relman,
21 Robert Pledl and Mark Peterson from McNally Peterson, and
22 Abigail Coursolle and Catherine McKee from the National Health
23 law firm, Your Honor.

24 THE COURT: And, Mr. Wardenski, you'll be taking the
25 lead?

1 MR. WARDENSKI: Yes, Your Honor.

2 THE COURT: All right. Unless someone else is speaking
3 on behalf of the plaintiffs, then you don't need to introduce
4 yourself, but if someone else does speak for the plaintiffs,
5 then you should introduce yourself for the benefit of our court
6 reporter.

7 I'll hear appearances for the defendant.

8 MR. KILPATRICK: Thank you, Your Honor, and good
9 morning. For the defendants, Assistant Attorney General Steven
10 Kilpatrick -- that's me, and I'll be speaking for the
11 defendants -- and with me are AAGs Jody Schmelzer and Colin
12 Roth.

13 THE COURT: All right. Good morning, all, and we will
14 proceed with a hearing today just on defendants' motion to amend
15 the scheduling order with regard to its response to the motion
16 for preliminary injunction and hearing.

17 I have a general sense of the two sides' positions thanks
18 to your submissions, but I want to begin with the plaintiff to
19 see if I can confirm a couple of very specific matters. The
20 first is whether or not you'd be willing to forgo, for purposes
21 of preliminary injunction, your argument that the challenged
22 exclusion violates the Medicaid Act.

23 MR. WARDENSKI: Not at this point, Your Honor, but it's
24 something that we could, you know, potentially discuss.

25 THE COURT: All right. The second question is as to

1 the situation after the Obama regulations were passed, was there
2 ever a period of time that Wisconsin, as the administrator of
3 the Medicaid Act in the state of Wisconsin, had indicated that
4 it would no longer follow the challenged exclusion? In other
5 words, was there some point --

6 MR. WARDENSKI: I --

7 THE COURT: I'm sorry. In other words, was there some
8 point at which the plaintiffs had reason to believe that
9 Wisconsin would administer the Obama regs after the ACA
10 consistent with the position that you're taking in this case?

11 MR. WARDENSKI: Your Honor, I'm not aware of any public
12 action taken by the State to announce that they would not
13 enforce the challenged exclusion or take any actions to roll it
14 back. Both of my clients, however, did reasonably believe,
15 given the HHS regulations and the other developments in the law
16 that we cited in our PI brief, that the exclusion was -- could
17 no longer be enforced and --

18 THE COURT: And, Mr. Wardenski, I will give you an
19 opportunity at the end of my questioning of both sides to make
20 whatever additional argument you think necessary, realizing that
21 we're not arguing the merits of your case at this point. I
22 wanted to know whether there was any point at which the State of
23 Wisconsin or, indeed, the Obama Administration took the position
24 that the State of Wisconsin could no longer administer Medicaid
25 in the state consistent with the challenged exclusion.

1 MR. WARDENSKI: So, Your Honor, I'm not aware of the
2 State taking any action. I do know that the Section 1557
3 regulations did specifically describe state Medicaid programs as
4 being covered health programs and activities that would be
5 subject to those regulations.

6 THE COURT: All right. Let me then turn to the
7 defendants. Do you disagree with the last statement, that the
8 ACA regs themselves did require the State of Wisconsin to
9 provide coverage for gender-confirming surgery?

10 MR. KILPATRICK: In the -- under -- as to the Medicaid
11 Act, Your Honor, as to --

12 THE COURT: No, no. No, no, no. Stay with me now.

13 MR. KILPATRICK: Okay.

14 THE COURT: The ACA was passed. We're in agreement on
15 that.

16 MR. KILPATRICK: Yep.

17 THE COURT: And Section 1557 included a prohibition on
18 sex discrimination in federally-funded health programs, and then
19 regulations were passed. Do you agree that those regulations
20 prevented Wisconsin from following the challenged exclusion as
21 the administrator of the Medicaid Act?

22 MR. KILPATRICK: Your Honor, I don't know what our
23 clients' position is as to that. I do know that -- well, let me
24 put it this way: I'm not aware of DHS or the Secretary stating
25 that the state Medicaid exclusion would no longer be enforced

1 after the federal regulations came out. I do know that the
2 State of Wisconsin was a party in that Texas federal court
3 litigation to enjoin those HHS regulations.

4 THE COURT: Which, I guess, would suggest that if they
5 were not enjoined, then Wisconsin was among the states who
6 believed they were aggrieved by having to ignore their own
7 coverage rules.

8 MR. KILPATRICK: It's possible. Obviously --

9 THE COURT: But you don't know formally --

10 MR. KILPATRICK: I don't --

11 THE COURT: You don't know formally what position
12 Wisconsin took, say, in an affidavit in the Texas litigation as
13 to the impact of the regulations on the State of Wisconsin, in
14 other words, what they said in order to establish standing in
15 that litigation.

16 MR. KILPATRICK: Correct. I don't know, and
17 specifically I don't know with respect to enforcing Medicaid.

18 THE COURT: All right. Let me then pose a second
19 question to the defendants, and that is simply assuming that the
20 principal claims here for purposes of preliminary injunction
21 were to concern the ACA's Section 1557 prohibition and the Equal
22 Protection Clause prohibition, isn't this essentially the same
23 issues you've now been briefing in *Boyden*?

24 MR. KILPATRICK: Likely, yes. I mean, obviously there
25 are some differences between the two exclusions. The *Boyden*

1 exclusion was in the uniform benefits health plan to the state
2 employees, and this exclusion was specifically to, you know,
3 Medicaid beneficiaries as a DHS rule --

4 THE COURT: But so what? It's still -- legally the
5 challenge is the same. Now, I guess your position is you're not
6 certain whether there isn't some distinction factually that may
7 have a legal impact, but I don't know what that would be.
8 There's just two straightforward claims in *Boyden*, and they look
9 very much the same in *Flack*, assuming we leave out the Medicaid
10 Act challenge, which I don't really follow anyway, but leave
11 that aside, the basic legal issues are the same or do you
12 disagree --

13 MR. KILPATRICK: The legal issues -- yes. This is
14 Attorney Kilpatrick. Yes, Your Honor, the legal issues would be
15 the same with regard to the ACA, Equal Protection, yes,
16 generally, yes.

17 THE COURT: Obviously you know where I'm going with
18 this, which is so how much more additional work is going to be
19 required to brief those issues, at least on the legal side,
20 understanding that the impacts would be more sweeping if an
21 injunction were entered with respect to the enforcement of the
22 challenged exclusion. It's a far greater group, and so the
23 impacts would be greater.

24 MR. KILPATRICK: Right, Your Honor, and I think the
25 initial -- my initial response would be we would need time with

1 regard to looking into experts on how that would affect the
2 Medicaid program.

3 THE COURT: Well, and -- I get it.

4 That brings me back to the plaintiffs then. Would you
5 consider, for purposes of immediate preliminary injunction
6 relief, limiting it to the named plaintiffs, since I don't know
7 how I could find a need for a preliminary injunction with
8 respect to the putative class because I don't know the
9 circumstances of anyone else except for what you've provided as
10 to the plaintiffs here.

11 MR. WARDENSKI: Yes, Your Honor. While I would agree
12 that the most urgent relief is for the two named plaintiffs
13 here, we presented evidence in the form of expert declarations
14 that what we consider to be the unlawful exclusion is harming,
15 you know, hundreds, if not more, transgender adults who are on
16 Medicaid in the state but --

17 THE COURT: Mr. Wardenski, this is -- this is the
18 second time -- I'm trying to get you focused. The only thing
19 I'm considering right now is the motion to amend the scheduling
20 order, and if your position is that you want to proceed as to
21 all potential beneficiaries under the Medicaid Act for
22 preliminary injunction and that you want to proceed on all three
23 of your claims, including that the challenged exclusion violates
24 the requirements of the Medicaid Act itself, then I don't know
25 how I don't grant a substantial extension of time to the State.

1 But if you were to say to me that you'll limit it to the
2 named plaintiffs, who, by the way, are the only ones who have
3 documented having immediate impacts, and that you'll limit it to
4 the legal challenges that are already well known to the State by
5 virtue of a pending case before the Court, then I'd be less
6 sympathetic to a substantial extension of time by the State.

7 I'm not hiding the ball here for either side but -- so you
8 have to decide, which is it?

9 MR. WARDENSKI: Your Honor, we are willing to limit the
10 relief to the two plaintiffs in this case for the preliminary
11 injunction motion, and since we believe that the plaintiffs
12 have demonstrated a likelihood of success on all their claims,
13 we think the claim can be resolved without the Medicaid Act
14 claims at this point.

15 THE COURT: All right. Then that goes back to
16 defendants, because with those two narrowing positions, I'm not
17 sure what really is required that the work hasn't already been
18 done. I realize you only have so many hours in the day, and we
19 all want to enjoy the nice weather that we're finally receiving
20 having had the heat of summer and the cold of winter in all of a
21 month, but it seems to me that you could -- you ought to be able
22 to put together a reasonable response much sooner than the end
23 of August with those two narrowing conditions.

24 MR. KILPATRICK: Well, Your Honor, there's still the
25 fact that the plaintiffs did file with their motion, you know,

1 four medical expert reports and six treating physician
2 declarations, so we still need to get, you know, experts, one or
3 more, of our own and review documents that the other side has
4 had -- has been able to review and to consult with experts, so I
5 think there is still some need for time beyond the regularly
6 scheduled date.

7 THE COURT: Have you not retained any experts in
8 *Boyden*?

9 MR. KILPATRICK: We have retained two in *Boyden*, one on
10 the cost side and one on the medical efficacy/safety side.

11 THE COURT: So could -- I mean, as a practical matter,
12 what's going to be the difference here? You've got two experts.
13 If you really needed to take a few depositions, that would --
14 when could your -- could treating physicians be available,
15 Mr. Wardenski?

16 MR. WARDENSKI: I know that our experts can be made
17 available. I don't know about the treating physicians, but we
18 could find that out quickly.

19 THE COURT: Well, did you file affidavits from the
20 treating physicians?

21 MR. WARDENSKI: We filed affidavits from treating
22 physicians for both plaintiffs and also for expert witnesses --

23 THE COURT: No, you can't have -- hang on.
24 Mr. Wardenski, if you'd just stick with the question I posed.
25 You filed affidavits from treating physicians. I didn't ask

1 about your experts.

2 MR. WARDENSKI: Okay.

3 THE COURT: And the treating physicians will have to be
4 made available promptly, understanding that they're busy people
5 and may have to be at their offices. It may have to be a
6 truncated deposition for purposes of preliminary injunction, but
7 the treating physicians would have to be made available. I'm
8 not going to require both sides to produce their experts for
9 depositions in a preliminary injunction setting, so that's not
10 going to happen, and both sides already have experts.

11 So how much time would you need following depositions of
12 the treating physicians for the State to file its response?

13 MR. KILPATRICK: Yeah. Well, first, Your Honor, I do
14 note that we believe that there's one plaintiff here in the
15 *Flack* case that has some mental health issues that is not
16 present in the *Boyden* case, so we do want to review the medical
17 records before we make specific decisions on how many, or if at
18 all, how many depositions of the treating physicians we're going
19 to take.

20 THE COURT: All right.

21 MR. KILPATRICK: And then after --

22 THE COURT: Let me stop you there. How soon can you
23 get the medical records to the State?

24 MR. WARDENSKI: Today.

25 THE COURT: All right. So you'll have those medical

1 records shortly, and I'll give you a couple weeks to review them
2 and decide whether you need depositions and a week after that to
3 take any depositions, so I'm willing to give you 30 days from
4 today to file your response. Should that be sufficient?

5 MR. KILPATRICK: It should be, Your Honor, yes. Thank
6 you.

7 THE COURT: All right. That would make your response
8 due -- sorry. I don't have my calendar up. Perhaps defendants'
9 counsel can tell me when that moves your response date to. Is
10 it July 3rd?

11 MR. KILPATRICK: It looks like it's, unfortunately,
12 yes, during that July 4th week.

13 THE COURT: Well, and I'm somewhat sympathetic to that
14 concern. Tell me when you would like it to be due without
15 abusing what I'm trying to give you as an extension.

16 MR. KILPATRICK: Right. Yes, thank you, Your Honor.
17 Sometime that next week, maybe mid or to late week because I'd
18 also like to remind the Court that we do have a response in
19 *Boyden* that is due at that -- a reply in *Boyden* due at that
20 time -- I think the 9th -- if the other side files their summary
21 judgment motion.

22 THE COURT: All right. You may have until Friday -- is
23 it the 13th? That's an auspicious date -- Friday, July 13th,
24 for your response, and I'll hold the preliminary injunction
25 hearing on Friday, July 20th, at 1:30 p.m. -- actually, no, why

1 don't we make it 10:00 a.m.

2 MR. KILPATRICK: Your Honor, this is Attorney
3 Kilpatrick. May I ask a question?

4 THE COURT: Of course. I'm going to give both sides a
5 chance to address anything else they'd like, but you're welcome
6 to ask your question now, sure.

7 MR. KILPATRICK: Thank you, Your Honor. Just a
8 question regarding the hearing. Is it the Court's intention
9 that it would be an evidentiary hearing and oral argument or
10 just one or both?

11 THE COURT: Well, at this point I don't know because I
12 haven't seen your response, but I'm not going to preclude either
13 side from having witnesses available to appear. That would
14 depend on the nature of the disputes that exist between the
15 parties factually as opposed to legally. If the real disputes
16 seem to me to be legal, then I won't see much point in having
17 witnesses testify, but I won't know that until I read your
18 response.

19 MR. KILPATRICK: Understood. Thank you, Your Honor.

20 THE COURT: All right. I'll hear first from
21 plaintiffs, and this would be a time, Mr. Wardenski, if there's
22 something more you think I'm missing generally -- and I
23 understand I restricted you a number of times to the questions I
24 posed -- this would be the time to raise them.

25 MR. WARDENSKI: Thank you, Your Honor. I do want to

1 emphasize -- and I know this goes to the merits a little bit,
2 but it also goes to the length of the extension -- that
3 Mr. Flack in particular is suffering from imminent harm, which
4 we've documented through several declarations, including his
5 therapist and the expert declaration of Stephanie Budge, and
6 both plaintiffs are at risk of worsening depression and --
7 including a risk of self-harm, and so we just urge that that be
8 taken into account in contrast with what amounts to routine
9 deadlines for defendants' counsel.

10 Also, the State did defend Mr. Flack's administrative
11 proceeding -- his administrative appeal of the Medicaid denial,
12 and so he is a well-known quantity to them, and most of the
13 records that we've submitted are in -- in large form things that
14 the State has seen before, and so those are the main points I
15 wanted to make.

16 I also wanted to just point out, as the Court is probably
17 aware, that three of the conflicts that the State raised in its
18 motion with regard to *Boyden* are not actually conflicts. The
19 first is they said they would file a summary judgment motion by
20 June 8 th which would keep them busy. They filed that, as you
21 know, on Friday, and we agree that the legal issues will
22 probably be identical, if not highly similar, with respect to
23 the Equal Protection and 1557 claims. They also said that they
24 would oppose the *Boyden* plaintiffs' motion to file the amended
25 complaint, which they did not do by the deadline on June 1st.

1 So, in short, the State has overstated, I think, the nature of
2 those conflicts, and we just want to emphasize that our clients
3 are in need of this medical care at the earliest possible
4 juncture, but we understand that a modest extension may be
5 necessary for both sides to have an adequate opportunity to
6 present their case.

7 THE COURT: Well, what are you proposing then in terms
8 of an alternative extension?

9 MR. WARDENSKI: We think at most an extra week to 15
10 days for the response brief would be appropriate with a hearing
11 shortly thereafter and that the Court can rely on the
12 declarations at the PI phase without extensive depositions, and,
13 as I said, we have most of our clients' medical records that we
14 can produce with appropriate protections to the State as early
15 as today, so we are willing to work with the State to resolve
16 any factual disputes, have already conferred with them about
17 that, and hope to, you know, make this more about the questions
18 of law than any disputed facts.

19 THE COURT: Well, my schedule is such that I can't give
20 you a hearing date much before the 20th anyway, but I would move
21 the hearing up one day to July 19th at 1:30, and I will move the
22 response date up to Thursday, July 12th.

23 I am not unsympathetic, Mr. Wardenski, to the situation
24 that your clients find themselves in, particularly Mr. Flack. I
25 know they've been going forward with treatment that may well be

1 crucial to their mental and physical well-being. I think that
2 the defendants have quite a row to hoe if they're really going
3 to be arguing that there's no harm, but I'm not going to
4 preclude them from having the opportunity to make that
5 determination. I agree with you that the -- if there are going
6 to be depositions taken, that they should be short and very much
7 to the point, whether it's a treating physician or of the
8 plaintiffs, but, you know, that's where we are. That's the
9 state of this record.

10 You haven't told me anything that indicates that your
11 clients were ever led to believe that there was going to be
12 coverage by the State, so you are asking for a change in the
13 status quo except to the extent I find, and I may well
14 ultimately find, that the State of Wisconsin was on notice that
15 they were going to have to comply and, indeed, went to Texas to
16 try to change their obligations under what was then the status
17 quo, although it may no longer be. So while I'm sympathetic, I
18 have to weigh the rights of both sides, and that's the best
19 accommodation I can give you at this time.

20 I'll hear if there's anything more from the defendants.

21 MR. KILPATRICK: No, Your Honor.

22 THE COURT: All right. Very good. Then we will
23 proceed as I've indicated, and I'll enter a brief order today
24 requiring the preliminary injunction response due on Thursday,
25 July 12th, and a hearing to proceed on Thursday, July 19, at

1 1:30 p.m., and I will see the parties at that time.

2 Thank you, all. We are off the record.

3 (Proceedings concluded at 11:28 a.m.)

4 ***

5 I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit
6 Reporter in and for the State of Wisconsin, certify that the
7 foregoing is a true and accurate record of the proceedings held
8 on the 5th day of June, 2018, before the Honorable
9 William M. Conley, U.S. District Judge for the Western District
10 of Wisconsin, in my presence and reduced to writing in
11 accordance with my stenographic notes made at said time and
12 place.

13 Dated this 10th day of July, 2018.

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_____/s/ Jennifer L. Dobbratz_____

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Jennifer L. Dobbratz, RMR, CRR, CRC
Federal Court Reporter

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