

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
July 19, 2018
1:36 p.m.

Defendants.

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

APPEARANCES:

For the Plaintiffs:

Relman, Dane & Colfax PLLC
BY: JOSEPH J. WARDENSKI
1225 19th Street, NW
Suite 600
Washington, D.C. 20036

McNally Peterson, S.C.
BY: ROBERT THEINE PLEDL
1233 North Mayfair Road, Suite 200
Milwaukee, Wisconsin 53226

Jennifer L. Dobbratz, RMR, CRR, CRC
U.S. District Court Federal Reporter
United States District Court
120 North Henry Street, Rm. 410
Madison, Wisconsin 53703
(608) 261-5709

APPEARANCES CONTINUED:

National Health Law Program
BY: CATHERINE A. MCKEE
200 North Greensboro Street, Suite D-13
Carrboro, North Carolina 27510

For the Defendants:

Wisconsin Department of Justice
BY: STEVEN C. KILPATRICK
COLIN T. ROTH
JODY J. SCHMELZER
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857

11 (Proceedings called to order at 1:36 p.m.)

12 THE CLERK: Case No. 18-CV-309, *Cody Flack and Sara Ann*
13 *Makenzie v. The Wisconsin Department of Health Services and*
14 *Linda Seemeyer*, called for an injunctive hearing.

15 May we have the appearances, please.

16 MR. WARDENSKI: Good afternoon. Joseph Wardenski for
17 plaintiffs Cody Flack and Sara Ann Makenzie.

18 MR. KILPATRICK: For the defendants, Assistant
19 Attorneys General Steven Kilpatrick, Colin Roth, and Jody
20 Schmelzer from the Wisconsin Department of Justice.

21 THE COURT: Very good. We are here --

22 MR. PLEDL: Your Honor, Robert Theine Pledl also for
23 the plaintiffs.

24 THE COURT: I'm sorry. I thought you had indicated
25 just yourself? You didn't name the other people who were

1 representing the plaintiffs?

2 MR. WARDENSKI: That's correct.

3 THE COURT: I apologize. I understand Ms. McKee and
4 Mr. Pledl are also appearing on your behalf, and I should have
5 listened more closely.

6 MR. PLEDL: Thank you.

7 THE COURT: But I understand that you all are
8 representing the plaintiffs.

9 We are here to address the plaintiffs' motion for
10 preliminary injunction, and it is seeking to enjoin enforcement
11 of Section -- Wisconsin Administrative Code Section DHS
12 107.03(23) and (24), which the plaintiffs call the challenged
13 exclusion, and that's generally how I will refer to it, although
14 I'll certainly know what defendants mean if they prefer to call
15 it the exclusion.

16 As far as giving some guidance to the parties, I'm going to
17 let you make your arguments. You probably both have either been
18 advised or have experienced the fact that I tend to interrupt
19 both sides because I'm trying to get at the heart of what I feel
20 the case may turn on, but I will be certain to give you time, if
21 I do interrupt you, to make any additional points. I'm not
22 always great about that, but I really do make an effort to make
23 sure that the parties have stated what they need to, and I
24 understand sometimes you just feel like even though it's not
25 going to have any impact on me, you need to make statements for

1 the record or for others, so I will allow you to do that.

2 But just by way of orientation for both sides, since when I
3 practiced law I always thought the purpose of oral argument was
4 to enlighten the judge, and the best way to do it is to find out
5 what the judge is concerned about, I'll just tell you on the
6 facts, it seems to me as I read the parties, there isn't any
7 dispute that there is such a thing as gender dysphoria or that
8 these plaintiffs suffer from gender dysphoria. I also think
9 that there doesn't appear to be any dispute that there are
10 viable treatments for gender dysphoria, hormone treatment, for
11 example, which is covered by Wisconsin Medicaid. So those are
12 sort of the givens.

13 It seems to me where the dispute is among the parties, and
14 if you're going to clarify on the facts for me, understanding
15 that I've read with some care both sides' proposals, the
16 original proposal of findings of fact from the plaintiff and the
17 responses by the defendant -- I'm not encouraging you to spend a
18 lot of time on the facts, but you're welcome to do that,
19 particularly as it relates to the specific issues -- but it
20 seems to me the primary factual dispute is whether
21 gender-confirming surgery has efficacy as a general matter or as
22 to plaintiffs specifically, and I will tell you at the outset
23 for the -- particularly for the plaintiff, who since it's your
24 motion I'll let you go first, that I don't know how I can't find
25 that your clients will suffer irreparable harm. I think you

1 have overwhelming evidence of that and -- by the treating
2 physicians, and after the Seventh Circuit's decision in
3 *Mitchell*, which found under a much higher standard of deliberate
4 indifference that that harm was real and needed to be addressed
5 and needed to be addressed promptly, I don't know how I could
6 come out another way, but defendants are welcome to tell me
7 where I'm misunderstanding that.

8 But I would encourage you to focus on the merits because I
9 think that's where there's more argument, and it really goes to
10 this question about what sex discrimination means. I have my
11 own views, and I will tell you candidly that, given the trend of
12 the law in the Seventh Circuit, that it's hard for me to see how
13 defining the eligibility of surgery based on one's natal sex
14 doesn't amount to sex discrimination, but I certainly respect
15 the defendants' right and the argument they can make, and I
16 think where the defendants -- I think the defendants have made a
17 reasonable case or some evidence as to a lack of irreparable
18 harm. I think they have a stronger argument -- certainly there
19 are district courts who have decided that sex discrimination
20 does not cover transsexual surgery or transgender surgery,
21 but -- or gender-confirming surgery, which would probably be
22 more accurate since we're talking about gender dysphoria. I
23 think gender-confirming surgery is probably the better term.
24 But I just have trouble with the straightforward statement of
25 sex discrimination and the fact that this regulation excludes

1 transsexual surgery, which means surgery for someone whose natal
2 sex is not consistent with that surgery. That seems like sex
3 discrimination, but that's where I think the argument really
4 turns. I would ask the parties to hold off on specific relief
5 because I think that's a separate discussion we can have at the
6 end of our discussion overall.

7 Those are my preliminary thoughts, and I'm interested to
8 hear both sides' arguments, and as I say, it is plaintiffs'
9 motion, so you have the floor.

10 MR. WARDENSKI: Thank you, Your Honor. As you know,
11 Mr. Flack and Ms. Makenzie are two transgender Wisconsin
12 residents who rely on Wisconsin Medicaid for their health care
13 needs. The policy at issue here is a categorical ban on
14 Medicaid coverage for all transition-related medical care,
15 regardless of individualized need.

16 THE COURT: Which I think is where the irreparable harm
17 argument sort of falls apart for the defendants because that's
18 exactly what *Mitchell* criticized was a categorical, rather than
19 an individual, review for the need for treatment. It doesn't
20 decide whether that is covered by the ACA, but it certainly
21 decides that that's medically necessary -- the treatment for
22 gender dysphoria is medically necessary and delay in obtaining
23 treatment is sufficiently harmful to constitute deliberate
24 indifference under the Constitution.

25 MR. WARDENSKI: We read *Mitchell* and *Fields v. Smith*

1 before the same way, and also the other federal cases outside of
2 the Seventh Circuit have --

3 THE COURT: -- understanding my focus at the moment.

4 MR. WARDENSKI: Sure, but that the categorical nature
5 of the policy is the issue and that the inability to have their
6 specific cases reviewed and their individual medical necessity
7 reviewed is the critical problem.

8 One minor clarification I'd like to make on the facts is
9 that the challenged exclusion by its terms prohibits coverage
10 for hormones but --

11 THE COURT: Well, only in the context of its use
12 with -- I've forgotten the exact phrase. Only with respect to
13 contemplation -- contemplated transsexual surgery, so, in other
14 words, you can get hormone treatments. In fact, my
15 understanding is at least one of your clients has received
16 payment for hormone treatments; is that not correct?

17 MR. WARDENSKI: Both of them have, so that's not at
18 issue here.

19 THE COURT: Yeah. So, I mean, I think you're just
20 mistaken to say that it covers it because it only covers it in
21 the context -- it would be like saying -- in this context like
22 saying it doesn't cover anesthesia.

23 MR. WARDENSKI: Right. Practically speaking --

24 THE COURT: It's directly related to the build-up to
25 actual transsexual surgery.

1 MR. WARDENSKI: Right. And where you draw that line I
2 don't think we need to address right now.

3 THE COURT: It's already been drawn in a way that is
4 consistent with allowing that treatment.

5 MR. WARDENSKI: So with respect to surgeries
6 specifically and the specific surgical treatments that Mr. Flack
7 and Ms. Makenzie are treating, Your Honor, you've also
8 recognized that there is no dispute that they have those needs
9 and that there's a consensus among their treating medical
10 providers and their therapists, as well as Dr. Budge, a
11 psychologist who independently evaluated them, that --

12 THE COURT: There's actually four different -- two for
13 each of psychologists who confirm that this would be appropriate
14 surgery for them for their gender dysphoria.

15 MR. WARDENSKI: Correct. So I think by any measure,
16 they meet or exceed the requirements of the WPATH standards of
17 care for those surgeries. And the State itself --

18 THE COURT: And why is it WPATH is the relevant? It
19 seemed to me that in terms of what is most authoritative, DSM-5
20 would be the most authoritative.

21 MR. WARDENSKI: The DSM --

22 THE COURT: Is it because WPATH expresses it more
23 clearly or because there's something about that specific
24 organization which the Court should give greater weight?

25 MR. WARDENSKI: The DSM sets forth a diagnostic

1 criteria for gender dysphoria and recognizes I think in short
2 form that surgeries and hormone treatments and others are
3 acceptable treatments. The WPATH standards of care spell that
4 out in much more detail for each of those types of treatments
5 and when they're appropriate, and both surgeons that would
6 perform the surgeries on Mr. Flack and Ms. Makenzie, Dr. King
7 for Mr. Flack and Dr. Gast, stated in their declarations that
8 they reviewed the eligibility of plaintiffs for surgery under
9 those standards of care. And DHS itself in the administrative
10 proceeding for Mr. Flack's appeal last year submitted a letter
11 from the medical director of the Bureau of Benefits Management
12 in Wisconsin Medicaid, Julie Sager, and in that letter Dr. Sager
13 admitted that surgeries are clinically indicated treatments for
14 gender dysphoria, simply that they did not reach the question of
15 medical necessity for these two plaintiffs because of the
16 exclusion.

17 So I would like to focus on the merits question, as Your
18 Honor asked, and, you know, state briefly that with respect to
19 irreparable harm, delayed or denied medical care on its own has
20 been recognized as an irreparable harm, and so defendants'
21 arguments that plaintiffs here must meet a much higher bar is
22 simply not relevant to the analysis. And, in fact, nothing that
23 defendants have submitted refutes that harm. Dr. Schmidt, their
24 expert, only offered an opinion on whether they were at imminent
25 risk of suicide or self-harm, and, again, that's not the

1 relevant inquiry, and he did not opine at all on whether
2 surgeries are or can be effective either in general or with
3 regard to these particular plaintiffs.

4 So on the likelihood of success prong, the text of Section
5 1557 reads "An individual shall not be excluded from
6 participation in, be denied the benefits of, or be subjected to
7 discrimination under any health program or activity receiving
8 federal financial assistance on the basis of sex," and *Whitaker*
9 commands a broad interpretation of the phrase "on the basis of
10 sex," and the language that we quoted in the brief from *Whitaker*
11 I think is important to emphasize that -- the Seventh Circuit
12 rule that by definition a transgender individual does not
13 conform to the sex-based stereotypes of the sex he or she was
14 assigned at birth, and they found that a policy that therefore
15 discriminates against a transgender individual punishes that
16 person for his or her gender nonconformance, which in turn in
17 that case violates Title IX. That same argument can be
18 applied -- that same holding can be applied here.

19 Further, as the Seventh Circuit and other courts have
20 found, gender identity, being transgender, and undergoing gender
21 transitions are all forms of sex discrimination. They're all
22 functions of one's sex, that you can talk about being
23 transgender, having a gender identity that differs from your
24 birth sex, undergoing a gender transition to confirm your gender
25 identity outwardly. And so the policy here can't be understood

1 without reference at least in some way to sex and gender-based
2 classifications. That was the reasoning of *Whitaker*, and I
3 think that same reasoning applies here.

4 THE COURT: If I understand the defendants' approach,
5 they would argue that all of those cases are concerned with
6 conforming behavior and that this is a different question, which
7 is a very specific surgery, transsexual surgery, which is not
8 based on any kind of behavior or any stereotypical behavior.

9 MR. WARDENSKI: I understand defendants' argument, and
10 I think that's the narrow application of *Price Waterhouse* that
11 the *Whitaker* court rejected, that the stereotyping at issue here
12 is if you're treating a trans person or trans people differently
13 because they're a transgender, it's treating them differently,
14 punishing them for being gender nonconforming, and, therefore,
15 that is a form of sex discrimination.

16 THE COURT: And why do you emphasize *Whitaker* over
17 *Hively*, which is an en banc decision and I read it to come to a
18 similar conclusion? Do you view *Whitaker* closer on the facts
19 because it involved a transgender student?

20 MR. WARDENSKI: Closer on the facts and the procedural
21 posture. It was a PI in which similar harms were raised as the
22 effective discrimination, but I agree that *Hively* is also
23 controlling here and that the --

24 THE COURT: I don't think anything's clearly
25 controlling here, but I think you probably have the stronger of

1 the argument.

2 MR. WARDENSKI: So the *Hively* reasoning, which the
3 *Whitaker* court followed a month or two later, was that the
4 traditional conception of sex discrimination protections of
5 being discrimination against men for being men and against women
6 for being women was too narrow and that the broader construction
7 of the phrase "on the basis of sex" that the Supreme Court
8 announced in *Price Waterhouse* and reaffirmed in *Oncale* and
9 subsequent cases is the relevant analysis. And so in *Hively* the
10 plaintiff was a lesbian, and the Court wrote that Ms. Hively is
11 not saying she was discriminated against at work because she's a
12 woman. She's saying she's discriminated against -- was
13 mistreated at work, denied a promotion, for being a lesbian.

14 THE COURT: Because of her sexual orientation.

15 MR. WARDENSKI: And her sexual orientation was part and
16 parcel of her sex, and in that same paragraph of *Hively*, the
17 Court goes on to say that other courts have recognized that same
18 principle applies in the gender-identity context.

19 I think the Sixth Circuit's recent case is persuasive
20 because it applied *Hively* expressly, the *EEOC v. Harris Funeral*
21 *Homes* case, to make the same point, that you can't think
22 about --

23 THE COURT: I'm generally familiar with the ruling,
24 yeah.

25 MR. WARDENSKI: So I think *Whitaker* is helpful in that

1 it talks about transgender -- a gender identity determination in
2 the context of both a statute, Title IX, which 1557
3 incorporates, but also in terms of the equal protection
4 principles and that the equal protection analysis, which I'll
5 turn to, doesn't stop in *Whitaker* at sex stereotyping, that the
6 Court went on, as it did in *Hively* in the equal protection
7 analysis, to say you can't think about this policy without some
8 reference to sex. It was essentially that there are gender
9 classifications at issue here. In *Whitaker* it was you can't
10 talk about birth certificates and gender markers or boys' rooms
11 and girls' rooms or any of that.

12 THE COURT: Since you turned to equal protection, it
13 really turns on what standard of review is required, doesn't it?
14 I know that you would take the position in your brief that you
15 went under rational basis, and the government takes a position
16 that they would win at least under a middle scrutiny. They even
17 say under strict scrutiny they'd win, but to me which way that
18 falls, which standard I apply, probably determines the outcome.

19 MR. WARDENSKI: I disagree with that, and I'll start
20 with rational basis. We obviously think intermediate scrutiny
21 is appropriate, but even under rational basis, the two
22 justifications that the State presented -- and I'll talk about
23 each of them in turn -- were cost savings and some interest in
24 public health in not encouraging people to get gender-confirming
25 surgeries.

1 THE COURT: And from that you take -- and I don't
2 necessarily disagree with you that a justification based on the
3 newness or uncertainty as to efficacy is not one of the
4 articulated reasons.

5 MR. WARDENSKI: Correct. And so with respect --

6 THE COURT: Were it one of the articulated reasons,
7 would your answer be the same under rational basis?

8 MR. WARDENSKI: No, it wouldn't, and I'd like to point
9 to the report of Dr. Mayer who -- which defendants submitted in
10 connection with *Boyden* but also attached as one of their
11 exhibits here. He testified in his deposition that all he's
12 looking at is their, you know, significant scientific support
13 that sort of proves that these treatments will work and that he
14 hasn't found that study. Whether or not that's true, that
15 disregards the medical consensus that on a case-by-case basis
16 these procedures have and do work, and they've actually worked
17 for the two plaintiffs here. They obviously haven't had the
18 surgeries they're presently seeking, but they both have had
19 surgical procedures that have furthered their gender transition.
20 They've both had hormone treatments, and the evidence in the
21 declarations from their providers, from themselves, and from
22 Dr. Budge all confirm the benefits in alleviating gender
23 dysphoria and improving their quality of life. And I think
24 that's really the most relevant touchstone here is, both for the
25 likelihood of success and the irreparable harm piece, is is this

1 likely to work for them and do they have the right to, in
2 consultation with their doctors and medical providers, make the
3 case that this is medically necessary, which I think they've
4 certainly shown they can.

5 THE COURT: Is that -- would that be the test under a
6 rational basis?

7 MR. WARDENSKI: So --

8 THE COURT: Because I'm not sure -- you know, I failed
9 to acknowledge the two plaintiffs, and I assume they're both
10 here today?

11 MR. WARDENSKI: One of the plaintiffs is here, Ms.
12 Makenzie.

13 THE COURT: Sara Ann Makenzie is here? If you'd just
14 raise your hand. Nice to meet you from a distance.

15 I hope that anything that's said today doesn't come across
16 as being indifferent to your condition or for the need for
17 treatment, and in asking these questions, I don't mean to
18 minimize it in any way, but under a rational basis test, it
19 doesn't really focus on the individual. It focuses on whether
20 or not there are articulated reasons that would justify
21 exclusion of a specific surgery, and certainly experimental
22 surgeries can be excluded and have been excluded under Medicaid
23 for coverage, and the question is, is the science -- let's face
24 it, I mean, it was 1984 when DSM-III finally got around to
25 addressing homosexuality as nothing related to mental illness,

1 and it's been -- we've gone through a spectrum. Now I think the
2 understanding of gender dysphoria is much greater and possible
3 treatments for it, and maybe that's the answer, that it's no
4 longer -- it could no longer be argued that it's experimental,
5 and, in fact, defendants don't make that argument, so we're in a
6 different category, but I'm not sure that there isn't -- under
7 rational basis that there couldn't be a cost/benefit analysis
8 made by the State.

9 MR. WARDENSKI: So with respect to the efficacy, I
10 agree that -- and I think it's a salient point that the research
11 has evolved greatly in the last 20 years, especially in the last
12 probably 10 or 15 years, to a point where there is now a medical
13 consensus that might not have existed before and that the DSM-5,
14 which has been around for four or five years now, you know,
15 reflected that advancement and the understanding of what it
16 means to be transgender and, you know, that gender dysphoria is
17 suffering from the incongruence, not the incongruence in the
18 first place.

19 But with respect to the cost/benefit analysis, why we don't
20 think it's rational here, either as, you know, an exercise in
21 cost savings or because this is, you know, too unproven a
22 treatment, fails for the same reasons in that, one -- and we
23 know we're not arguing the Medicaid claims, but the Medicaid Act
24 does contain procedural requirements for how participating
25 states have to provide care. Medicaid exists for the purposes

1 of covering care, and even if the cost estimate that they
2 submitted with their response brief --

3 THE COURT: We don't -- I'll hear from them --

4 MR. WARDENSKI: Even if that were accurate, that would
5 amount to about one-tenth of 1 percent of the annual budget of
6 \$9.7 billion, and so -- and what's not rational about the policy
7 is why are you singling out one diagnosis or one set of
8 procedures as applied to one group of people and not any others.
9 In Dr. Mayer's report, he said he has questions about the
10 efficacy of thousands of common treatments that Medicaid does
11 cover like cholesterol treatments and, you know, probably got
12 their surgeries and so forth, and the exclusion that we're
13 looking at, you know, has the company of tattoo removal and
14 food, which is just a different analysis. So singling this
15 particular thing out isn't rational in the context of both the
16 fact that this is a Medicaid program that has federal
17 requirements but also that cost savings wouldn't be tolerated if
18 we didn't want to pay for cancer surgeries because they're too
19 expensive or HIV treatments because they're too expensive, and
20 the same is true here.

21 So that's why I don't think this policy survives even
22 rational scrutiny, and it's certainly arguable, given the
23 history as we know it so far, that because of the way that the
24 exclusion is phrased in terms of transsexual surgeries as
25 opposed to any particular treatment -- there is no one

1 transsexual surgery. It's a range of procedures that someone
2 may seek as medically appropriate for them -- really defines the
3 exclusion in terms of a class of people that is a discrete group
4 of people targeted for differential treatment and their access
5 to health care, and there may be and something we would want to
6 attempt to prove in this case is that there's likely to be some
7 discriminatory animus at the root of a policy like that.

8 If, however, we reach intermediate scrutiny, we don't see
9 any way in which the policy can survive nor have --

10 THE COURT: I'll hear from the defendants on --

11 MR. WARDENSKI: -- nor have defendants really given us
12 anything on the record to suggest that.

13 THE COURT: Understood.

14 MR. WARDENSKI: So I'll stop now unless, Your Honor,
15 you have further questions for me --

16 THE COURT: I will give you a chance for some rebuttal.
17 In addition, I do want to take up with both parties the question
18 of what relief would be appropriate at this stage.

19 MR. WARDENSKI: Okay. Thank you.

20 THE COURT: Mr. Kilpatrick.

21 MR. KILPATRICK: Thank you, Your Honor. The defendants
22 here acknowledge that gender dysphoria is a serious medical
23 condition, a mental disorder. It is the distress resulting from
24 the incongruence between the person's sex at birth and their
25 gender identity, but that doesn't mean that the Wisconsin

1 Medicaid program needs to cover transsexual surgeries, which
2 they have determined are unproven medical -- unproven medical
3 surgeries that don't meet the medical necessity --

4 THE COURT: Is it clear that Medicaid has reached that
5 determination? As was pointed out, Dr. Sager seems to agree
6 that it is an appropriate treatment; it's just one that's
7 categorically excluded.

8 MR. KILPATRICK: Right, so there is --

9 THE COURT: I guess that's the difference between the
10 Medicaid program and its expert.

11 MR. KILPATRICK: Right. Well, the other issue -- the
12 other difference is that back in 1994 when the exclusion was --

13 THE COURT: First --

14 MR. KILPATRICK: -- first inserted --

15 THE COURT: First codified.

16 MR. KILPATRICK: -- right, into the regs, it was
17 determined that there was a cost, and it was medically
18 unnecessary, and medically unnecessary is defined in the
19 administrative code.

20 THE COURT: Does it matter that the medical facts have
21 changed and that it's a much more accepted treatment now than it
22 was then? In fact, your own expert acknowledges that it is a
23 legitimate treatment. In other words --

24 MR. KILPATRICK: Well, I don't think our expert does --
25 that it accepts that it's a legitimate treatment. Quite the

1 opposite. Dr. Mayer you're referring to?

2 THE COURT: Dr. Sager.

3 MR. KILPATRICK: She's not our expert.

4 THE COURT: She's not your named expert, but she's the
5 expert for Medicaid, for the Medicaid program.

6 MR. KILPATRICK: She is one of the doctors that reviews
7 the claims, the Medicaid claims, yes.

8 THE COURT: Right.

9 MR. KILPATRICK: And reviewed one for Mr. Flack.

10 THE COURT: So your clients' expert, one of your
11 clients' experts, have acknowledged it's a legitimate treatment,
12 I mean, which is reflective of where we've come in terms of our
13 understanding of the possible benefits -- I would say in the
14 medical community likely benefits -- for some individuals, not
15 all, who have gender dysphoria. I mean, it seems like that's --
16 I don't know how you can't say that's a consensus.

17 MR. KILPATRICK: Well, it may be the consensus, but the
18 consensus may not be proven by medical science, and that's what
19 our expert, Dr. Mayer, is saying, is that the consensus out
20 there, the treating physicians and the clinicians, are too
21 far --

22 THE COURT: I mean, there's probably -- here's the
23 problem I see. There are -- and as plaintiffs' experts point
24 out, there are a lot of procedures which are not -- have not
25 been justified by blind studies, which, nevertheless, medical

1 doctors are prescribing every day for individuals. You know,
2 they're legion if we start talking about uses of pharmaceuticals
3 that are off the specific study that originally allowed the FDA
4 to approve it, and yet you're covering all kinds of those
5 procedures, and it does seem that the best explanation for why
6 you're not covering this one is because of the nature of the
7 procedure, that is, that it is recommended for transsexuals.

8 MR. KILPATRICK: Well, again, we disagree with that
9 statement, but, you know, Dr. Mayer isn't alone, Your Honor.

10 THE COURT: Maybe it's a larger point. I'm supposed to
11 decide this for purposes of a preliminary injunction. Even if
12 your position prevails on the merits after a full hearing, which
13 may well include the appointment of a neutral expert to assist
14 the Court, I mean, they've got DSM-5, they've got the consensus
15 of the AMA, they have WPATH -- I'm not sure how people pronounce
16 it -- and they have, maybe most importantly, the individual
17 physicians here saying that these individuals will benefit from
18 this.

19 MR. KILPATRICK: Their own doctors.

20 THE COURT: Yeah. But in most settings, treating
21 physicians are given great weight. In fact, the Seventh Circuit
22 in social security standards tells me that that can't be
23 overturned unless there are clear, articulable reasons given by
24 an administrative law judge. So my standard right now is
25 likelihood of success. How can I not say there's some

1 likelihood of success, that there's no good underlying basis, at
2 least if the question is intermediate scrutiny --

3 MR. KILPATRICK: Sure.

4 THE COURT: -- maybe even under what's been described
5 by the plaintiffs as rational basis with a bite, how wouldn't I
6 say at this early stage that there's some likelihood of success?

7 MR. KILPATRICK: Well, again, getting back to kind of
8 our underlying argument is that there's no scientific proof, and
9 Dr. Mayer --

10 THE COURT: But there's no blind studies that people
11 can point to, but, first of all, gender dysphoria -- treatment
12 for gender dysphoria through these surgeries has been developing
13 over 30 years maybe at most, and they're still learning where
14 it's best and where it's not, and there's no guarantee with this
15 surgery or with hormone treatments or other things that that
16 single individual is going to do better or worse, so it's going
17 to take substantial time to develop the kind of blind -- double
18 blind study that -- and I'm not even sure it's possible to
19 construct it that way or to develop a clear consensus based on
20 long-term treatment that this is beneficial or not beneficial,
21 but all of the medical experts who come to a consensus have come
22 to exactly that consensus, that it is beneficial.

23 MR. KILPATRICK: What I would say then is that the
24 history here, the evidentiary history here of the two plaintiffs
25 themselves, shows that they have transitioned, began

1 transitioning. They have received some type of treatment in the
2 medical transitioning aspect, in the social transitioning, and
3 the records show that they have stated to their physicians that
4 they have felt better and they have improved quality of life.
5 But then what happens is time passes, and a new procedure is
6 requested, and a new procedure is desired, and the distress
7 comes back so --

8 THE COURT: I mean, you're describing most psychiatric
9 patients with long-term conditions.

10 MR. KILPATRICK: Right, but, again, the basis is -- the
11 argument is that there's no proof that the surgery is going to
12 treat the underlying mental condition, which is the gender
13 dysphoria.

14 THE COURT: More likely than not based on what you've
15 presented me in this case right now? Yeah, it more likely than
16 not, based on the consensus of the medical experts, it will
17 help.

18 MR. KILPATRICK: Well, again, not only do we -- just
19 for the record, we point to Dr. Mayer, but Dr. Mayer cites the
20 Hayes reports and CMS, the federal Centers for Medicare and
21 Medicaid Services, that state that there's no studies that are
22 proven that the surgeries are beneficial, medically effective,
23 for treating --

24 THE COURT: You don't disagree that the AMA has come to
25 a different conclusion.

1 MR. KILPATRICK: Don't disagree with that, Your Honor,
2 but as our expert has said, the AMA has been wrong in the past.

3 THE COURT: Fair enough.

4 MR. KILPATRICK: Okay. And also I guess we want to
5 point out too that there has been a recent Tenth Circuit case
6 that came out just last Monday that confirms what our expert,
7 Dr. Mayer, has said, and our position is that there is no
8 governing medical consensus on the appropriateness of the
9 treatment, and that is to counteract the plaintiffs' citation to
10 the Iowa district court decision that came out, and even we want
11 to point out that WPATH acknowledges this, that there are some
12 complications for sex-reassignment surgery, and Dr. Schechter, I
13 believe, would acknowledge that as well for the plaintiffs. And
14 so I believe that what is -- that the DHS has determined that if
15 there is no proven medical benefit and that there are risks, the
16 benefit isn't going to outweigh those risks, and for that reason
17 there is an exclusion.

18 THE COURT: How does that comport with what the Seventh
19 Circuit found in *Mitchell* because it criticized, I guess,
20 exactly what you're asking for, which is a categorical -- that I
21 uphold a categorical exclusion. It is very express in its
22 criticism of categorically deciding all individuals with gender
23 dysphoria will not benefit from this surgery.

24 MR. KILPATRICK: Well, *Mitchell* was concerning hormones
25 and not the surgery, and our position is that, as you pointed

1 out, that the hormones are being covered by DHS and --

2 THE COURT: Well, it's not actually true that it was
3 just covering hormones. They were seeking hormones in the
4 context of moving to a surgical remedy.

5 MR. KILPATRICK: I'm looking at Attorney Roth because
6 he was the attorney on the *Mitchell* case in the Seventh Circuit.

7 THE COURT: And I grant you that, you know, the Seventh
8 Circuit may take a different approach, but in terms of how that
9 panel was looking at it, they were certainly considering both
10 hormonal and surgical intervention.

11 MR. KILPATRICK: And I do want to address an issue that
12 you brought up before with regard to Dr. Julie Sager and a
13 statement made in a letter --

14 THE COURT: Sure.

15 MR. KILPATRICK: -- is that here Dr. Sager is one of
16 two doctors for DHS that reviews the claims, and there was no
17 determination regarding medical necessity as to Mr. Flack and
18 certainly not to Ms. Makenzie because there wasn't a submission
19 of a claim or a denial, so what I'm saying here is there has not
20 been a prejudgment or a determination that it is medically
21 necessary.

22 THE COURT: There's been no judgment.

23 MR. KILPATRICK: Right. There's been no judgment.

24 THE COURT: And the only relief that's being sought is
25 to enjoin the lack of any evaluation --

1 MR. KILPATRICK: Right.

2 THE COURT: -- because of the enforcement of the
3 express exclusion.

4 MR. KILPATRICK: Right. That's correct. So if we
5 wanted to talk about remedies, it would be --

6 THE COURT: And we can talk about that -- as I said,
7 I'll hear from both sides, but what you haven't addressed is the
8 ACA claim and how I could find that a categorical exclusion from
9 eligibility for surgery on the basis of one's natal sex, that
10 is, the sex assigned at birth, isn't sex discrimination. How
11 can that not be sex discrimination?

12 MR. KILPATRICK: Well, you can look at it two ways, one
13 as a transgender status --

14 THE COURT: That's not -- it says transsexual, but what
15 it means is natal sex, transformation from one's natal sex.
16 It's based on one's natal sex. How is that not sex
17 discrimination?

18 MR. KILPATRICK: Well, under the Seventh Circuit
19 precedent, you've got *Ulane*, which clearly states that
20 transgender persons are not part of a protected class --

21 THE COURT: But that's not what we're talking about.
22 We're talking about sex discrimination under the ACA.

23 MR. KILPATRICK: Right. And then under *Whitaker* -- so
24 *Whitaker* was a Title IX case, and the ACA incorporates Title
25 IX --

1 THE COURT: Understood.

2 MR. KILPATRICK: -- so that's why that's relevant, and
3 also *Ulane* would be relevant because Title IX incorporates some
4 decisions from the Seventh Circuit, but I believe because --

5 THE COURT: What you're really pointing out is *Ulane*
6 has been narrowed and criticized since it was issued, and we
7 progressed towards this point where, as *Whitaker* points out,
8 there's all kinds of examples of extensions of what we mean by
9 sex discrimination. What I'm saying to you is we don't need any
10 of those, whether it's sexual orientation or manifestations of
11 one's sex. Here we have an exclusion from surgery based on your
12 natal sex.

13 MR. KILPATRICK: Well, it's also an exclusion of a
14 particular procedure. As we said before, hormones are not
15 excluded, and so to that extent, there is no --

16 THE COURT: I mean, it's not relevant that you're
17 allowing some treatments. You've chosen a treatment that for --
18 if done inconsistent with one's natal sex is not eligible for
19 coverage. That's what the regulation says, so that's sex
20 discrimination.

21 MR. KILPATRICK: Well, I believe what *Whitaker* holds is
22 that in light of *Ulane* -- it didn't overrule *Ulane* -- it says
23 that -- it said Mr. Whitaker could bring a sex discrimination
24 claim under the sex stereotyping theory, and that's -- here we
25 don't see the sex stereotyping theory working.

1 THE COURT: But, I mean, that was just an example of
2 one of the ways in which we've expanded what we mean by sex
3 discrimination, whether it's sex stereotyping or sexual
4 orientation or all kinds of ways we've expanded the meaning of
5 sex discrimination, but here it's based on one's natal sex.
6 It's based on sex. The coverage exclusion is based on what sex
7 was assigned to you at birth.

8 If a natal sex -- if one's natal sex is male, you can get
9 reconstructive surgery for your penis, but if your natal sex is
10 female, you can't. You can't get reconstructive surgery or
11 constructive surgery. It's just -- I mean, it seems like it's
12 based on sex.

13 MR. KILPATRICK: Well, again, our position would be
14 it's based on transgender status, which is then not protected,
15 and I believe there's just a disagreement between the parties
16 here with regard to how to read *Whitaker*, and our position is
17 that *Whitaker* allows a sex-based claim for a transgender person
18 only on a sex-based -- sex stereotype theory. That's the way
19 that we read *Whitaker*.

20 THE COURT: Let me try it another way. If one's natal
21 sex were female and a doctor determined that because of back
22 pain they needed a breast reduction, you would cover that.

23 MR. KILPATRICK: I believe so, yes.

24 THE COURT: But if one's natal sex is male and a doctor
25 determines, as they did here, that you needed breast reduction

1 to address gender dysphoria, you exclude it.

2 MR. KILPATRICK: Well, that's a little different.
3 Breast reduction to address --

4 THE COURT: No, that's transsexual surgery. Your
5 regulation -- Wisconsin Medicaid excludes it.

6 MR. KILPATRICK: But if -- sorry, again, but if you're
7 born a male and there is -- if you're born a male and you
8 have -- you have breasts, there would be coverage, I believe,
9 for a breast reduction surgery if it's necessary to --

10 THE COURT: That's my point. But if your natal sex --
11 you say "born a female." I think you'd have a lot of dispute
12 among experts as to whether that's -- but at least your assigned
13 sex.

14 MR. KILPATRICK: Right. That's the term we've been
15 using.

16 THE COURT: -- is male, you will not allow the same
17 breast reduction that is allowed to those who are natively female
18 or assigned a natal sex of female.

19 MR. KILPATRICK: Well, I think that -- I think what
20 would be prohibited would be transsexual surgery --

21 THE COURT: No, the surgery is breast reduction,
22 period. That's the surgery. It's not -- it's breast reduction.
23 You're assigning a different meaning to it if it's done for
24 gender dysphoria versus back pain based on one's natal sex.
25 That's the impact of the regulation. I mean, factually that is.

1 It seems like it's almost besides the point how -- whether
2 Congress is expanding and the courts and the Supreme Court is
3 expanding the meaning of sex discrimination for sexual
4 orientation or sexual stereotyping and the straightforward
5 question as to whether this regulation is discrimination based
6 on one's sex.

7 MR. KILPATRICK: Well, again, just --

8 THE COURT: Fair enough.

9 MR. KILPATRICK: -- I sound like a broken record, but
10 it's transgender.

11 THE COURT: Understood. All right. Anything else that
12 you want to add on the merits or irreparable harm?

13 MR. KILPATRICK: Well, yes.

14 THE COURT: I didn't give you a chance to even address
15 irreparable harm. If you want to, you're certainly welcome to.

16 MR. KILPATRICK: Well, as you can tell, the basis of
17 our irreparable harm defense lies on accepting the fact that the
18 receipt of surgery would have a benefit, and our position has
19 been that there is no benefit so there's no irreparable harm
20 from not receiving --

21 THE COURT: But you don't even have an expert who is
22 saying there's no benefit to these plaintiffs. You have an
23 expert saying there's no imminent or grave -- there's no
24 imminent risk of some grave injury --

25 MR. KILPATRICK: Right.

1 THE COURT: -- if it's not going forward, but that's
2 not the standard at all. The standard is simply will they
3 suffer irreparable harm, and after *Mitchell*, hasn't that pretty
4 much been decided, that a treatment to address gender dysphoria,
5 even the delayed treatment, is a serious medical need and could
6 constitute deliberate indifference?

7 MR. KILPATRICK: Well, again, *Mitchell* concerns
8 hormones, and we're talking about surgery.

9 THE COURT: Well, we can argue about whether it draws a
10 distinction between these two but --

11 MR. KILPATRICK: I guess the point is that surgery in
12 our case here -- our position has been that there is no medical
13 evidence for medical efficacy regarding surgery, so if that is
14 withheld, there's no irreparable harm.

15 THE COURT: And I understand again on the standard --
16 you may prevail on this on the merits at trial, but on the
17 standard I'm to assign, there is, with respect, substantial
18 evidence that they will suffer irreparable harm. They will
19 continue to not get the benefits of this treatment for whatever
20 length of time it takes us to get to trial.

21 MR. KILPATRICK: Right. And, again, our position would
22 be there would be no benefit of treatment based on the lack of
23 evidence that shows --

24 THE COURT: You say the lack of evidence --

25 MR. KILPATRICK: The lack of scientific evidence to

1 show that the surgery is going to actually treat the gender
2 dysphoria itself.

3 THE COURT: But at best you have conflicting evidence.
4 I would, as I look at it, say that between the consensus of the
5 medical community and, I would think more importantly, the
6 consensus of the medical experts for this individual against a
7 general criticism of the extent of the science at this point or
8 lack of double-blind studies, they'd probably have the better of
9 the greater weight of the evidence at this point, but we may
10 disagree again.

11 MR. KILPATRICK: Yes, we would. With regard to
12 rational basis, I just wanted to make a quick argument that --

13 THE COURT: Yeah.

14 MR. KILPATRICK: -- we believe that if rational basis
15 is proper here, that this level of scrutiny would come out in
16 the defendants' favor because of the reasons that we've stated
17 of cost savings to the Medicaid program and also to the -- kind
18 of the public health aspect of it, which, again, relies on our
19 position that the decision not to cover this was based on and is
20 based on a lack of evidence that shows its medical efficacy
21 towards treating the gender dysphoria.

22 THE COURT: Do you have other examples where Wisconsin
23 Medicaid has excluded coverage based on a weighing of the costs
24 versus the medical efficacy of the treatment?

25 MR. KILPATRICK: Not specifically with the medical

1 efficacy, only -- I believe that in '94 when the regulations
2 were in place, in addition to the transsexual surgery, there
3 were some other exclusions added, and the DHS simply said that
4 there was a cost savings to that. So, no, I don't have anything
5 with regard to specifically --

6 THE COURT: To weighing the medical efficacy.

7 MR. KILPATRICK: -- weighing the medical efficacy.

8 THE COURT: And it's not your position that this is an
9 experimental surgery at this point.

10 MR. KILPATRICK: Not experimental, just nonproven, to
11 the extent there's a difference there.

12 THE COURT: Understood.

13 MR. KILPATRICK: It would be nonproven.

14 THE COURT: Is there anything else that you want to add
15 at this point, understanding that we will come back to remedy?

16 MR. KILPATRICK: Other than the fact that under
17 rational basis we believe that the exclusion can be upheld.

18 THE COURT: Understood. Thank you. And I'll hear any
19 brief rebuttal that you may have to that further argument by the
20 government, and then if you would, explain to me what -- well,
21 if my understanding of the relief being sought, which is to
22 enjoin the application of the challenged exclusion, if you're
23 seeking something more than that, then help me understand what
24 that would be.

25 MR. WARDENSKI: Okay. So one minor point --

1 THE COURT: Sure.

2 MR. WARDENSKI: -- in rebuttal. Under Wisconsin
3 Medicaid's regulations, and I'm looking at 107.06(1) in the
4 Administrative Code which covers physicians services, it defines
5 medically necessary in terms of what's within the scope, quote,
6 "within the scope of the practice of medicine and surgery in
7 conformity with generally accepted good medical practice," so,
8 again, the prevailing medical consensus on the opinions of the
9 providers really should be the relevant guide even under --

10 THE COURT: And that's 109.7 --

11 MR. WARDENSKI: This was 107.06(1), which was for
12 physician services and --

13 THE COURT: I got it.

14 MR. WARDENSKI: -- similar language for hospital
15 services, which is .08(1).

16 Your Honor, with respect to the relief that we're
17 requesting, in our original motion for Mr. Flack and Ms.
18 Makenzie, we asked the Court to enjoin the State from denying
19 them medically -- Medicaid coverage for medically necessary
20 surgical treatments they need either now or during the pendency
21 of the case.

22 THE COURT: I'm sorry. That may be the injunction
23 you're seeking overall, but your preliminary injunction I
24 thought was addressed specifically to the defendants'
25 enforcement of the challenged exclusion.

1 MR. WARDENSKI: Correct, as applied to plaintiffs, and
2 we think that given the state of the record for these two
3 individual plaintiffs, which are the only subject of the
4 injunction right now, that we would ask the Court to order that
5 the procedures that they are seeking be approved expeditiously.

6 THE COURT: What about the response that they haven't
7 been reviewed yet?

8 MR. WARDENSKI: So let's take them one by one. So for
9 Mr. Flack, he --

10 THE COURT: He met the requirements.

11 MR. WARDENSKI: He went all the way through the
12 administrative appeal of his prior authorization denial. So
13 there's a prior authorization on the record, and we think that
14 to the extent that further review is necessary, it can happen
15 very quickly. We would ask within seven days, given the urgency
16 of this situation.

17 For Ms. Makenzie, she's done everything to this point
18 except for have her surgeon at UW Health submit a prior
19 authorization request. She's requested that that happen, and
20 they have not submitted that yet. We would ask again that once
21 that is submitted, that that would be reviewed in an expedited
22 manner because both surgeons who would treat them and all of
23 their treating medical providers who referred them to surgery
24 agree that they meet the WPATH standards of care and the
25 diagnostic criteria under the DSM, and at least with respect to

1 the preliminary injunction, those should be the guide.

2 THE COURT: So would it be appropriate to require a
3 ruling in the case of Ms. Makenzie once she completes the
4 submission within a certain amount of time?

5 MR. WARDENSKI: We would ask for the injunction to --
6 for any injunction to issue subject to her submitting the prior
7 authorization. I suspect, although I don't know, that UW Health
8 has not submitted that request because of their knowledge that
9 this would not be covered under the regulations, and that may
10 explain why they haven't submitted something so far, and an
11 injunction would certainly help explain why they can submit that
12 request.

13 THE COURT: All right. Let me hear from the --

14 MR. WARDENSKI: And we would also ask, Your Honor, that
15 to the extent an injunction issues, that the Court not require a
16 bond for the reasons that we stated.

17 THE COURT: I saw that, and that seems appropriate. I
18 do have one concern, but I'll hear first from the defendant.

19 MR. KILPATRICK: Thank you, Your Honor.

20 THE COURT: From the defendants.

21 MR. KILPATRICK: Just briefly getting back to -- I know
22 this is about remedy here, but I forgot to mention that -- why
23 *Hively* didn't apply to the merits argument. I would just say
24 we'll stand by our brief, page 45 of our brief.

25 THE COURT: That's fine. You certainly -- neither side

1 has waived any arguments that they made in the briefs.

2 MR. KILPATRICK: Okay. I believe what's going on here
3 is you're correct that this hearing is about the exclusion only,
4 and I believe what the plaintiffs are trying to do is to get you
5 and this court to wade into a determination that needs to be
6 made by DHS.

7 THE COURT: Let's break it down. Was there preliminary
8 approval for Mr. Flack?

9 MR. KILPATRICK: No, there was no preliminary approval.
10 There was --

11 THE COURT: Was there a prior authorization? What's
12 the status of that?

13 MR. KILPATRICK: Well, there was no addressing the
14 merits of his claim because of the exclusion, so the doctor,
15 Dr. Sager and others --

16 THE COURT: Just so we can get this clear factually, do
17 you disagree with that, that there was no ultimate conclusion
18 because of the exclusion?

19 MR. WARDENSKI: No, we agree with that.

20 THE COURT: Okay. So you're arguing that there should
21 be a ruling. On the other hand, given the delay that's occurred
22 because of the exclusion, how much time is reasonable?

23 MR. KILPATRICK: Well, yes, I believe plaintiffs had
24 asked for seven days. I've been told by some DHS folks here
25 that seven days is very quick and --

1 THE COURT: So what would you propose?

2 MR. KILPATRICK: -- needs to be more.

3 Do you have any idea?

4 Is it possible to get back to the Court after consulting
5 with DHS?

6 THE COURT: You can have until tomorrow --

7 MR. KILPATRICK: Okay. Great.

8 THE COURT: -- to advise me, by noon tomorrow.

9 MR. KILPATRICK: Thank you, Your Honor. And, again, we
10 believe that what's going on here and what plaintiffs are asking
11 for would really be an end run around the agreement not to have
12 the Medicaid Act be a part of this --

13 THE COURT: Well, I think that's an extreme
14 characterization of what they're asking for. I agree with you
15 that the agency needs to make a determination, but they've been
16 denied a determination because of the application of this
17 challenged exclusion.

18 MR. KILPATRICK: Right.

19 THE COURT: So I'm not going to criticize them that
20 they would like this to be occurring. I would also encourage,
21 if the defendants are going to propose a time limit, that they
22 keep in mind the amount of time that has been delayed because of
23 the challenged exclusion so they're realistic about the amount
24 of time, and also if there is a distinction between the status
25 of Mr. Flack's submission, in other words, that it's fully ripe

1 for decision, as opposed to Ms. Makenzie, that you draw some
2 distinction between those two periods of time.

3 MR. KILPATRICK: It's our understanding that Ms.
4 Makenzie still needs to provide --

5 THE COURT: I don't think there's any disagreement that
6 there's still one piece that's required.

7 MR. KILPATRICK: Okay. So, again, I guess our position
8 then is -- on relief is that it just needs to be limited to the
9 exclusion, if that's the way that the Court is going to rule, as
10 to these two plaintiffs, and we will get back to the Court with
11 regard to any time frame on processing or making a determination
12 on the medical necessity aspect.

13 THE COURT: Since presumably there is a procedure in
14 place to have that done, would it be appropriate for me to
15 require those that meet the other -- that others who meet the
16 same requirements be entitled to a similar review?

17 MR. KILPATRICK: In a certain amount of time or just in
18 general?

19 THE COURT: In general. To exclude the application --
20 to enjoin the application of this exclusion to others who may
21 apply.

22 MR. KILPATRICK: Well, I believe that there was an
23 agreement or stipulation or understanding that this would be
24 only as applied to the two named defendants in the case.

25 THE COURT: And, indeed, in terms of any specific

1 injunction that requires you to make a review within a limited
2 amount of time, that is my intent.

3 MR. KILPATRICK: Okay.

4 THE COURT: But I'm a court of equity. If you think
5 there's some that's distinguished -- I haven't seen anything in
6 the record that shows that this is going to be a floodgate of
7 individuals. Perhaps you can come back to me if that turns out
8 to be the case, but I'd be very surprised based on the condition
9 and the caution with which this kind of surgery is recommended.
10 But I'm having trouble figuring out why I wouldn't, as a matter
11 of equity, extend, since it's being requested generally, that
12 this same challenged exclusion be enjoined from enforcement
13 during that -- the remainder of the lawsuit.

14 MR. KILPATRICK: Well, I guess this raises the issue
15 about the possibility of staleness of the claims. What I mean
16 is that Mr. Flack submitted a claim several months ago now, and
17 from what our DHS folks are saying is that to do a proper
18 medical necessity evaluation, there may need to be more updated
19 medical records submitted, so I'm not sure if in the case of
20 Mr. Flack or in the case of any others, that any type of order
21 that DHS perform a review based on records that are only in
22 their hands I think would be improper.

23 THE COURT: You're sort of asking two -- you're raising
24 a whole different question, and I don't invite and I don't
25 expect that tomorrow you're going to tell me that you don't know

1 how long it's going to take because they have to do a complete
2 resubmission. It was your -- it was the defendants' application
3 of the challenged exclusion that caused the staleness with
4 respect to the two plaintiffs, so assuming that Ms. Makenzie
5 completes her application, I would expect you to rule on their
6 status and their entitlement to this surgery based on those
7 claims as to those two. I'm talking about an entirely new
8 submission by someone else, and so there's not going to be a
9 staleness issue. They're going to have to comport with all the
10 requirements. What I'm asking is, is there any reason why the
11 reasoning here wouldn't apply to someone else who applied, at
12 least until trial?

13 MR. KILPATRICK: I don't see any for new claims.

14 THE COURT: Understood.

15 MR. KILPATRICK: But, again, Your Honor, I must
16 reinforce the argument that we do have two doctors at DHS who
17 are making these reviews, and we don't have them here, but I
18 hate to tell them that they have to make a medical determination
19 based on incomplete medical --

20 THE COURT: Let me go back to the plaintiffs. It's a
21 valid concern generally. It rings a little hollow given that
22 the defendants created the situation but --

23 I'm sorry, I'm not limiting you to one person arguing it.
24 If there's some contribution you want to make, you're more than
25 welcome.

1 MR. PLEDL: I passed it along. That's all I need to
2 do, Judge.

3 THE COURT: All right. Very good.

4 MR. WARDENSKI: Well, Your Honor, the reason why we're
5 asking and think that it's reasonable for expedited review is
6 because --

7 THE COURT: We're not talking about expedited review.
8 We're talking about whether or not the medical experts assigned
9 the responsibility for review would have reason, medical
10 concern, that they no longer have current information.

11 MR. WARDENSKI: My answer to that is that they do have
12 current information because with respect to Dr. King, who
13 submitted the prior authorization last summer, he submitted a
14 declaration on the record that if the prior authorization was
15 approved, he would still be ready to move forward.

16 THE COURT: And what was the date of that?

17 MR. WARDENSKI: That was just before we submitted the
18 motion, so in late May.

19 THE COURT: All right.

20 MR. WARDENSKI: On top of that --

21 THE COURT: Hang on.

22 MR. WARDENSKI: Sorry.

23 THE COURT: That was late May. And then what about the
24 two psychologists' confirmations? That was the surgeon, right?

25 MR. WARDENSKI: That was the surgeon, yeah.

1 THE COURT: What about the two psychologists who
2 confirmed that they believed this should proceed?

3 MR. WARDENSKI: One of them --

4 THE COURT: I guess the medical doctor is saying he's
5 satisfied with the earlier certifications.

6 MR. WARDENSKI: Right. And so Mr. Flack's treating
7 therapist, Daniel Bergman, submitted a declaration as well, as
8 well as his treating endocrinologist, Amy DeGueme.

9 THE COURT: So I can't -- I'll hear from you, Mr.
10 Kilpatrick, but I can't see why that wouldn't be sufficient to
11 have updated Mr. Flack's status.

12 MR. WARDENSKI: And we've also produced all medical
13 records to date for both of them.

14 THE COURT: Do you want to be heard further on this?

15 MR. KILPATRICK: Yes. Thank you, Your Honor. That
16 the -- there is a prior authorization request on file with DHS
17 for Mr. Flack, but it is from 2016.

18 THE COURT: Stay with me on this one --

19 MR. KILPATRICK: Okay.

20 THE COURT: -- because we're not going to spend a lot
21 of time on this. I'm saying if that has been updated through
22 late May of this year, including the surgeon and the two
23 individual psychologists saying this is still recommended, isn't
24 that sufficiently current that there isn't any reason to delay
25 further with respect to Mr. Flack?

1 MR. KILPATRICK: Again -- okay. Then, yes, Your Honor.

2 THE COURT: That's what I would expect. And with
3 respect to Ms. Makenzie, is there -- would your answers be the
4 same, although I guess she's still lacking one of the
5 recommendations.

6 MR. WARDENSKI: She has both recommendations.

7 THE COURT: In terms of the submissions that have now
8 been made to the Court in late May.

9 MR. WARDENSKI: Right. With her supplemental
10 declaration this week, she submitted the two letters from her
11 treating therapist and another therapist from when she had a
12 second opinion. On top of that, she has asked, as of two weeks
13 ago, for a prior authorization request, and we will follow up on
14 that as soon as possible.

15 THE COURT: But that is still missing even from the
16 record before this court.

17 MR. WARDENSKI: Correct.

18 THE COURT: Okay.

19 MR. KILPATRICK: Your Honor, if I may?

20 THE COURT: You may.

21 MR. KILPATRICK: With regard to Ms. Makenzie, I
22 believe, and correct me if I'm wrong, that she's part of a
23 managed care program, not Medicaid fee-for-service but managed
24 care, so I believe that there's another layer of review that
25 isn't in Mr. Flack's case, that there's a managed care HMO level

1 of review for Ms. Makenzie so any --

2 THE COURT: Let me hear from the plaintiffs, your
3 understanding in that regard.

4 MR. WARDENSKI: Yes. My understanding of what
5 Medicaid -- Wisconsin Medicaid is doing is requiring recipients
6 to enroll in managed care programs, and so Ms. Makenzie is in a
7 managed care program as of June 1st. I don't actually know what
8 Mr. Flack's status is.

9 THE COURT: That's fine. Well, they're conceding
10 that's not an issue on Mr. Flack, so no sense in raising an
11 issue that's not been raised, but with respect to Ms. Makenzie,
12 what is the procedure? Does Medicaid -- does the Medicaid panel
13 review this first and then pass it on? Because I'm not going to
14 enjoin a third party who hasn't been heard from.

15 MR. KILPATRICK: Right. Could you give me one second?

16 THE COURT: Sure.

17 MR. KILPATRICK: So it's a Medicaid managed care review
18 first, and then it goes to DHS Medicaid, so there is another
19 layer of a third-party review for Ms. Makenzie's case that isn't
20 in Mr. Flack's.

21 THE COURT: All right. What I will do is by noon
22 tomorrow, you should accommodate that requirement and give me a
23 proposed date for completion, and I'll give until 4:30 for the
24 plaintiffs to respond and then address it accordingly.
25 Actually, why don't we say 4:00.

1 Do you want to be heard on the bond issue?

2 MR. KILPATRICK: No, Your Honor. I do request one more
3 thing though with regard to the injunction being extended to
4 other parties --

5 THE COURT: Yes.

6 MR. KILPATRICK: -- that are not before. In addition
7 to the agreement, the understanding was the State has not done a
8 cost analysis. We submitted a cost analysis from *Boyden*, as you
9 know, that isn't directly on point, but we haven't had the
10 chance to do that yet. We're trying to, and so --

11 THE COURT: How many applications have been made for
12 coverage of transgender surgery to the department?

13 MR. KILPATRICK: I don't have an answer for you right
14 now. I'm sorry.

15 THE COURT: It can't be many, right?

16 MR. KILPATRICK: It probably is not. If *Boyden* is --
17 right. Likely not, but we don't know. I mean, there's always
18 been an exclusion so --

19 THE COURT: I understand your point, although we have
20 lots of states that are providing coverage. I would think we
21 could get some reliable statistical information. If you want to
22 supplement that, you can do that by the end of the day tomorrow.

23 MR. KILPATRICK: By the end of the day with regard to a
24 cost analysis?

25 THE COURT: Yes. What I'm looking for is just some

1 evidence as to how many likely submissions are going to be made
2 out of your Medicaid population based on a percentage basis
3 based on experience in other states.

4 MR. KILPATRICK: Okay.

5 THE COURT: And what that would mean in terms of
6 possible cost.

7 Anything else for the defendant?

8 MR. KILPATRICK: No, Your Honor.

9 THE COURT: Anything else for the plaintiff?

10 MR. WARDENSKI: No, Your Honor. Thank you.

11 THE COURT: I have appreciated your patience with me
12 and your attempts to address the Court's concerns, and to the
13 extent I have failed to fully appreciate either side's
14 arguments, I apologize -- I'm doing my best -- and I will
15 endeavor to give you a prompt decision in light of the concerns
16 for these plaintiffs.

17 I am -- in light of the -- well, I guess maybe the best way
18 to address it is I realize I'm not the last stop in any decision
19 and that while I think the weight of the case law -- current
20 case law and the record probably favors an injunction, any
21 limited stay I would give you to gain relief from the Seventh
22 Circuit is going to be weighed by how long it's going to take
23 for you to complete the process, but I am not inclined to stay
24 this, for the reasons I've said, beyond a very limited period of
25 time, and if you want to comment on that, you're welcome to do

1 so.

2 MR. KILPATRICK: Not at this time, Your Honor.

3 THE COURT: All right. Very good. Thank you, all.

4 THE CLERK: This Honorable Court stands adjourned.

5 (Proceedings concluded at 2:47 p.m.)

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1 I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit
2 Reporter in and for the State of Wisconsin, certify that the
3 foregoing is a true and accurate record of the proceedings held
4 on the 19th day of July, 2018, before the Honorable
5 William M. Conley, U.S. District Judge for the Western District
6 of Wisconsin, in my presence and reduced to writing in
7 accordance with my stenographic notes made at said time and
8 place.

9 Dated this 23rd 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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