

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

CODY FLACK,
SARA ANN MAKENZIE,
MARIE KELLY, and
COURTNEY SHERWIN,
*individually and on behalf of all others
similarly situated,*

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES, *et al.*,

Defendants.

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

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND PERMANENT INJUNCTION**

Under Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Cody Flack, Sara Ann Makenzie, Marie Kelly, and Courtney Sherwin (the "Named Plaintiffs"), on behalf of themselves and the class of transgender Wisconsin Medicaid beneficiaries they represent in this lawsuit (the "Class"), respectfully move this Court for summary judgment on Defendants' liability on their claims under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 ("Section 1557"); the availability and comparability provisions of the federal Medicaid Act, 42 U.S.C. § 1396a(a)(10)(A)-(B), 42 C.F.R. §§ 440.230(b)-(c), 440.240(b); and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Plaintiffs seek (1) a declaratory judgment that Wisconsin Medicaid's categorical exclusion on gender-confirming health care, Wis. Adm. Code §§ DHS 107.03(23)-(24), 107.10(4)(p) (the "Challenged Exclusion"), violates the rights of Plaintiffs and the Class under Section 1557, the Medicaid Act, and the Equal Protection Clause; and (2) a permanent injunction

barring Defendants' further enforcement of the Challenge Exclusion to deny medically necessary treatments for gender dysphoria to transgender Wisconsin Medicaid beneficiaries.

As Defendants' violations of these laws will not be remedied fully by a permanent injunction alone, Plaintiffs move the Court to order such other equitable relief needed to cure these violations. Such relief may include, *inter alia*, providing notice to transgender Wisconsin Medicaid beneficiaries and their medical providers that medically necessary treatments for gender dysphoria are no longer excluded from coverage; adopting internal guidelines for determining when gender-confirming care is medically necessary, and as a result, covered under Wisconsin Medicaid, consistent with DHS's policies and practices for other services; and providing the third-party managed care organizations that administer Wisconsin Medicaid with those coverage guidelines and other guidance on covering these services. Accordingly, Plaintiffs ask that the Court direct the Parties, within 14 days of its decision on this motion, to meet and confer on the terms of a remedial order; to submit a joint proposed plan if they reach agreement; and, if not, to submit separate proposed plans and accompanying briefs for the Court's consideration. Plaintiffs anticipate that, if necessary, the proposed remedy can be considered by the Court at the trial set to begin on September 16, 2019.

Finally, if the Court rules in Plaintiffs' favor on their Section 1557 claims, the individual Named Plaintiffs will be entitled to compensatory damages under that statute. Plaintiffs therefore request a trial on damages for the Named Plaintiffs on the currently scheduled trial date.

In support of this motion, Plaintiffs submit an accompanying memorandum of law, proposed findings of fact, a joint stipulation to findings of fact, and supporting documents and exhibits.

Dated: April 23, 2019

Respectfully submitted,

/s/ Joseph J. Wardenski

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