

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

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

Plaintiffs,

v.

Case No. 18-CV-0309

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
ANDREA PALM, in her official capacity
as Secretary-Designee of the Wisconsin
Department of Health Services,

Defendants.

**DEFENDANTS' OBJECTIONS TO THE
COURT'S PROPOSED FINAL ORDER**

Defendants Wisconsin Department of Health Services (DHS) and Andrea Palm, in her official capacity as DHS Secretary-Designee (collectively "Defendants"), without waiving their previous opposition to any permanent injunction (Dkt. 223; 224:1–6; 233:11), submit these objections to the Court's Proposed Final Order (Dkt. 239).

Objection No. 1.

In subparagraphs a., b., and c. of paragraph 3 of the Proposed Final Order, Defendants object to inclusion of the term "gender-confirming" for the following reasons.

First, the term “gender-confirming” has no universally-accepted meaning and there is no definition of the term “gender-confirming” included in this Proposed Final Order. Inserting the undefined “gender-confirming” term may create confusion as to whether additional services that did not fall under the Challenged Exclusion must now be covered. This is problematic given that the Court is ordering Defendants to provide notices that will include the term to third-parties.

Second, use of the term “gender-confirming” before the phrase “services that were previously excluded from coverage under the Challenged Exclusion” is unnecessary and duplicative. The purpose of the four subparagraphs in paragraph 4—issue a *ForwardHealth Update* and send notices to social service providers, Medicaid HMOs, and fee-for-service Medicaid beneficiaries—is to provide notice to individuals and entities not parties to this case about (1) this Court’s permanent injunction as to the Challenged Exclusion, and (2) the opportunity for transgender Medicaid beneficiaries, who were either prevented from requesting coverage or were denied coverage because of the Challenged Exclusion, to try again.

This purpose can be fulfilled without the use of the “gender-confirming” term. The language in subparagraph d. of paragraph 3, provides sufficient and proper notice without inclusion of this term. The Final Proposed Order properly defines “Challenged Exclusion” as the parties did in the litigation:

Wis. Admin. Code §§ DHS 107.03(23)–(24), 107.10(4)(p). (Dkt. 239:1.) The Challenged Exclusion excluded coverage for the following Medicaid services: “Drugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics,” and “Transsexual surgery.” Wis. Admin. Code §§ DHS 107.03(23)–(24), 107.10(4)(p). The Court’s summary judgment order enjoined Defendants from enforcing the Challenged Exclusion. (Dkt. 217:38.) Therefore, simply providing notice that “services that were previously excluded from coverage under the Challenged Exclusion” (Dkt. 239:2) are now covered by Wisconsin Medicaid accurately describes the scope of this Court’s permanent injunction.

Finally, to the extent using the term “gender-confirming” in the *ForwardHealth Update* and notices is meant to provide additional clarity as to exactly what services must now be covered, that effort is premature. That is because Defendants, within 180 days of the Final Order, intend to comply with the Court’s directive to “publish a coverage policy regarding gender-confirming treatments previously excluded under the Challenged Exclusion.” (Dkt. 239:2.) This is a more appropriate forum for DHS to define exactly what coverage Wisconsin Medicaid will now provide without the Challenged Exclusion. There is little to no value in giving notice to third parties about vague “gender-confirming services” within 90 days of the Final Order when Defendants’

detailed coverage policy regarding “gender-confirming treatments” will not exist until 180 days after that order.

Therefore, in subparagraphs a., b., and c. of paragraph 3 of the Proposed Final Order, Defendants respectfully ask the Court to strike the term “gender-confirming” when it appears before the word “services.”

Objection No. 2.

Defendants also object to the omission of a phrase in subparagraph c. of paragraph 3. After the first use of the word “services,” Defendants respectfully ask that the phrase “that were previously excluded from coverage under the Challenged Exclusion” be included. This language is already included after the word “services” in subparagraphs a., b., of paragraph 3 and after “treatments” in paragraph 4. Insertion of this phrase in subparagraph c. of paragraph 3 will make the entire Final Proposed Order internally consistent.

Finally, Defendants have no opposition to Plaintiffs’ already-filed objections to the Proposed Final Order. (Dkt. 241.)

Dated this 21st day of October, 2019.

Respectfully submitted,

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