

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

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

Plaintiffs,

v.

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

Defendants.

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

JOINT RULE 26(f) REPORT

Plaintiffs Cody Flack, Sara Ann Makenzie, Marie Kelly, and Courtney Sherwin (“Plaintiffs”) and Defendants Wisconsin Department of Health Services (“DHS”) and Linda Seemeyer, in her official capacity as Secretary of DHS (“Defendants”) (collectively, the “Parties”), through their undersigned attorneys, respectfully submit this Joint Rule 26(f) Report (“Report”).

1. The Parties’ counsel held a telephone conference on October 19, 2018 to discuss the matters set forth in Fed. R. Civ. P. 26. The Parties have had the opportunity to review and consent to the filing of this Report.

2. Nature of the Case. Plaintiffs are four transgender Wisconsin Medicaid beneficiaries who are seeking Medicaid coverage for surgical and/or medical treatments and services for gender dysphoria. Plaintiffs, on behalf of themselves and all similarly situated individuals, filed this action to challenge a DHS regulation, Wis. Adm. Code § DHS 107.03(23)-

(24) (the “Challenged Exclusion”), and Defendants’ continued enforcement of the Challenged Exclusion, as a violation of their rights under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (“Section 1557”); the comparability and availability requirements of the federal Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A)-(B); and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Plaintiffs initially filed this lawsuit on behalf of Plaintiffs Flack and Makenzie as individuals on April 30, 2018, and, on July 25, 2018, this Court preliminarily enjoined Defendants from enforcing the Challenged Exclusion against those two plaintiffs. Defendants have noticed an appeal of that preliminary injunction. On September 25, 2018, Plaintiffs filed an amended complaint with class action allegations seeking class-wide declaratory and injunctive relief, as well as damages for the individual named plaintiffs. Defendants filed an answer to the amended complaint on October 16, 2018.

3. Issues of Jurisdiction or Venue. The Parties agree that the Western District of Wisconsin is the appropriate venue for this case.

4. Related Cases. The Parties are unaware of any related cases.

5. Material Factual and Legal Issues. The Parties agree that the following material legal and factual issues exist:

- a. whether the Challenged Exclusion violates the prohibition against discrimination on the basis of sex under Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116;
- b. whether the Challenged Exclusion violates the availability requirement of the federal Medicaid Act, 42 U.S.C. § 1396a(a)(10)(A);

- c. whether the Challenged Exclusion violates the comparability requirement of the federal Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B);
- d. whether the Challenged Exclusion violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by discriminating against individuals on the basis of sex and/or for being transgender;
- e. whether the Court should certify a class of all transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a diagnosis of gender dysphoria, and who are seeking or will seek medical and/or surgical treatments or related services to treat gender dysphoria (the “Proposed Class”);
- f. whether the Court should designate Cody Flack, Sara Ann Makenzie, Marie Kelly, and Courtney Sherwin as representatives of the Proposed Class, and whether the Court should designate Plaintiffs’ undersigned attorneys at Relman, Dane & Colfax PLLC, McNally Peterson, S.C., and the National Health Law Program as counsel for the Proposed Class;
- g. what declaratory and/or injunctive relief should be awarded to Plaintiffs and the Proposed Class;
- h. what compensatory damages are available under Section 1557 to the named plaintiffs as individuals; and
- i. whether Plaintiffs are entitled to their reasonable attorneys’ fees and costs.

6. Simplification of Issues. The Parties will work cooperatively to simplify the issues where appropriate.

7. Admissions and/or Stipulations. The Parties will work cooperatively to make those appropriate stipulations of fact and regarding authenticity of documents to avoid unnecessary proof.

8. Advance Rulings from the Court. The Parties will attempt to bring to the Court's attention at the earliest possible time any issues relating to admissibility of evidence on which an advance ruling would be helpful.

9. Privilege and Confidentiality. The Parties have discussed potential issues regarding the production of and public disclosures of confidential information. The Parties have entered into a Stipulated Protective Order [Dkt. No. 41-1], entered by the Court with modifications on June 13, 2018. The Parties expect they will be able to resolve issues regarding the production and disclosure of privileged or confidential information by producing any such information under the terms of the Stipulated Protective Order. To the extent any disputes arise concerning the production of privileged or confidential information, the Parties agree that the Stipulated Protective Order and relevant provisions of the Federal Rules of Civil Procedure shall control. The Parties agree that the terms of the Stipulated Protective Order may be modified by mutual agreement of the Parties and the approval of the Court.

10. Amendment of Pleadings. The Parties agree that no further amendment to the pleadings be permitted without leave of the Court, with the exception of Defendants' right to file an amended pleading as a matter of course under Fed. R. Civ. P. 15(a)(1) as related to Defendants' answer to Plaintiffs' amended complaint filed October 16, 2018.

11. Motions Pending or Contemplated. Plaintiffs filed a motion for class certification on October 18, 2018, which is pending. Plaintiffs anticipate filing a motion to modify the

existing preliminary injunction to fully enjoin the Challenged Exclusion for the pendency of this litigation. The Parties anticipate filing motions for summary judgment.

12. Length of Trial. The Parties anticipate that this matter may be tried in approximately 5 days.

13. Settlement Discussions. The Parties have not discussed settlement of this lawsuit to date. Plaintiffs believe that a mediation following the Court's decision on Plaintiffs' pending class certification motion and anticipated motion to modify the preliminary injunction may be helpful.

14. Initial Disclosures and Discovery Schedule. The Parties propose that Rule 26(a)(1) initial disclosures be made on or before November 9, 2018, and that discovery commence on that date, but that Defendants may conduct limited discovery before that date in response to any motion Plaintiffs file before that date. Counsel for the Parties will supplement their initial disclosures pursuant to Rule 26(e) Federal Rules of Civil Procedure.

15. Discovery Cut-Off. The Parties agree that discovery will end six weeks before trial.

16. Electronic Service. The Parties confirm that documents filed through the Court's ECF system are served by ECF notification. The Parties also consent that service by electronic means shall be allowed as set forth in Fed. R. Civ. P. 5(b)(2)(E) and that such service shall be complete upon transmission and shall be considered the same as personal service, provided that the sender does not receive any indication that such electronic transmission was unsuccessful.

17. Discovery Requests in Electronic Format. The Parties agree that copies of all written discovery requests and proposed findings of fact shall be provided and/or served electronically in a format editable by the other party (such as Word format), and that copies of all

proposed findings of fact as required by the Court's standing order regarding summary judgment motions shall be served electronically in a similar editable format. The Parties agree to cooperate with respect to responding to discovery of electronically stored information.

18. Witnesses and Exhibits. The Parties agree that disclosure of all witnesses and exhibits for trial shall be completed in accordance with the Federal Rules of Civil Procedure or the deadline set by the Court pursuant to its preliminary pretrial order.

19. Expert Witnesses. The Parties propose the following deadlines for expert disclosures:

- a. Plaintiffs: 90 days before dispositive motions deadline.
- b. Defendants: 60 days before dispositive motions deadline.
- c. Plaintiffs' Rebuttal: 30 days before dispositive motions deadline.

20. Dispositive Motions. The Parties agree that all dispositive motions shall be filed no later than 4.5 months before trial.

21. Trial and Final Pretrial Dates. The Parties agree that this matter will be ready for trial on or after July 29, 2019. The Parties request that the final pretrial conference be held one week prior to trial.

Dated: October 19, 2018

Respectfully submitted,

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