

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

CODY FLACK and
SARA ANN MAKENZIE,

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

STIPULATION TO FINDINGS OF FACT

Plaintiffs Cody Flack and Sara Ann Makenzie (“Plaintiffs”) and Defendants Wisconsin Department of Health Services and Linda Seemeyer (“Defendants”) (collectively, the “Parties”) hereby stipulate to the following facts in connection with the Court’s consideration of Plaintiffs’ pending Motion for Preliminary Injunction [Dkt. No. 18] (“PI Motion”). These stipulations will supplement Defendants’ anticipated responses to Plaintiffs’ Statement of Proposed Facts [Dkt. No. 20] that Defendants will submit with their response to the PI Motion. The Parties reserve the right to stipulate to additional facts prior to the July 19, 2018 hearing on the PI Motion and will promptly notify the Court of any additional stipulations of fact.

The Parties stipulate to the following:

Venue

1. Under 28 U.S.C. § 1391, venue is proper in the Western District of Wisconsin.

Wisconsin Medicaid

2. Defendant Wisconsin Department of Health Services (“DHS”) is the Wisconsin state agency charged with the administration of Wisconsin Medicaid.

3. DHS is a recipient of federal funds, including Medicaid funding for Wisconsin Medicaid.

4. Defendant Linda Seemeyer, sued in her official capacity, is the Secretary of DHS. As Secretary, she is responsible for implementing the Medicaid Act consistent with federal Medicaid requirements. Wis. Stat. § 46.014.

5. Established in 1965 under Title XIX of the Social Security Act, Medicaid is a joint federal-state program that provides medical assistance to eligible low-income individuals. *See* 42 U.S.C. § 1396-1396w-5 (the “Medicaid Act”).

6. Medicaid enables states to furnish medical services to persons whose incomes and resources are insufficient to meet the cost of necessary medical services by reimbursing participating states for a substantial portion of the costs in providing medical assistance. 42 U.S.C. §§ 1396-1; 1396b.

7. Wisconsin, like every other state, participates in Medicaid. Defendant DHS is the Wisconsin state agency charged with the administration of Wisconsin Medicaid consistent with state and federal requirements. Wis. Stat. § 49.45.

8. DHS receives federal funding from the U.S. Department of Health and Human Services, including reimbursement of over half of the State’s Medicaid expenditures.

9. Wisconsin’s medical assistance statute, Wis. Stat. §§ 49.43-.65, and its implementing regulations, Wis. Admin. Code § DHS 101.01-.36, govern Wisconsin Medicaid.

10. Wis. Adm. Code § DHS 107.03(23)-(24) (the “Challenged Exclusion”) was adopted as an amendment to the Medicaid regulations in 1996, and went into effect on February 1, 1997. *See* Wis. Dep’t of Health & Fam. Servs. (DHFS), Clearinghouse Rule 96-154, 1 (Dec. 11, 1996) (“CR 96-154”).

11. Defendants enforce the Challenged Exclusion through the present day.

12. Currently, Wisconsin Medicaid has approximately 1.2 million enrollees.

13. The current annual Wisconsin Medicaid budget is approximately \$9.7 billion.

The Challenged Exclusion

14. The DHS regulations governing Wisconsin Medicaid do not define the term “transsexual surgery.”

15. DHS’s website currently contains the following statement on a webpage entitled “LGBT Health – Transgender Persons,” www.dhs.wisconsin.gov/lgbthealth/transgender.htm:

For people who need medical interventions such as hormones or surgery, these might be covered under private insurance plans. Currently, Wisconsin BadgerCare, BadgerCare Plus, Medicaid, and State of Wisconsin employee health insurance (ETF) do not cover gender reassignment surgery or drugs related to gender reassignment or hormone replacement. Please contact your health insurance company to learn more details about what services are covered by your insurance.

Gender Identity and Gender Dysphoria

16. The DSM-5 defines and describes “gender dysphoria” as follows:

Gender dysphoria refers to the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender. Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and/or surgery are not available. The current term is more descriptive than the previous DSM-IV term *gender identity disorder* and focuses on dysphoria as the clinical problem, not identity per se.

DSM-5 at 451. The Parties stipulate that Dkt. No. 21-1 is a true and correct copy of the Gender Dysphoria chapter of the DSM-5 and refer the Court to that document for a complete representation of its contents.

17. The DSM-5 contains the diagnostic criteria for Gender Dysphoria in Adolescents and Adults (302.85 (F64.1)) and the diagnostic features of this diagnosis. The Parties stipulate that Dkt. No. 21-1 is a true and correct copy of the Gender Dysphoria chapter of DSM-5 and refer the Court to that document for a complete representation of its contents.

18. Untreated gender dysphoria can result in psychological distress.

Plaintiff Cody Flack

19. Mr. Flack's gender identity is male.

20. Mr. Flack has been diagnosed with gender dysphoria.

21. Mr. Flack receives Supplemental Security Income ("SSI") and is enrolled in Wisconsin Medicaid.

22. Mr. Flack legally changed his name to Cody Jason Flack.

23. Since 2015, Mr. Flack has seen a psychotherapist, Daniel Bergman, who has treated him for gender dysphoria and other mental health conditions.

24. Since August 2016, Mr. Flack has been receiving hormone therapy (testosterone) under the supervision of Dr. Amy DeGueme, an endocrinologist.

25. As a result of the testosterone, he has developed facial and body hair, a deeper voice, and a more masculine appearance.

26. In October 2016, Mr. Flack had a hysterectomy with bilateral salpingo-oophorectomy—the total removal of his uterus, cervix, fallopian tubes, and ovaries. These surgeries were performed primarily to treat two serious medical conditions: dysmenorrhea, a

condition characterized by pelvic or lower abdominal pain during menstruation, and premenstrual dysphoric disorder (“PMDD”), a severe form of premenstrual syndrome. As Mr. Flack’s hysterectomy with bilateral salpingo-oophorectomy was necessary to treat his PMDD and dysmenorrhea, Wisconsin Medicaid covered the procedure.

27. In an effort to conceal his breasts from public view, Mr. Flack has engaged in a technique called “binding,” which flattens or reduces the appearance of breasts.

28. Mr. Flack finds binding extremely painful and, because of his disabilities, difficult to do himself. He has suffered respiratory distress, skin irritation, and sores as a result.

29. Mr. Flack has sought to obtain chest reconstruction surgery; specifically, a double mastectomy and male chest reconstruction.

30. Mr. Flack consulted with Dr. Clifford King, a plastic surgeon, about obtaining a double mastectomy and male chest reconstruction.

31. Mr. Flack provided Dr. King with letters of support from four medical providers—his primary care doctor, therapist, endocrinologist, and the physician who performed his hysterectomy and oophorectomy. In each of those letters, the provider stated that Mr. Flack has gender dysphoria and meets the criteria for surgery.

32. Dr. King determined that Mr. Flack was eligible for male chest reconstruction under the WPATH Standards of Care.

33. On July 18, 2017, Dr. Clifford King submitted a request for prior authorization to DHS for Wisconsin Medicaid coverage of the chest reconstruction surgery for Mr. Flack.

34. On August 2, 2017, DHS denied the prior authorization request made by Dr. King.

35. DHS’s denial was based on the Challenged Exclusion.

36. In a letter from DHS to Dr. King, dated August 2, 2017, DHS stated that each surgical procedure sought by Mr. Flack—mastectomy simple complete and breast reconstruction—“is not a covered benefit.” The letter contained the following notation: “08/02/17: Per WI administrative code DHS 107.03(24) transsexual surgery is a non-covered service. BA.” The Parties stipulate that Dkt. No. 21-18 is a true and correct copy of the full August 2, 2017 letter from DHS to Dr. King, and refer the Court to that document for a complete representation of its contents.

37. In a letter from DHS to Mr. Flack, dated August 2, 2017, DHS stated that Mr. Flack’s prior authorization requests for mastectomy simple complete and breast reconstruction were denied because, for each, “THE SERVICE REQUESTED IS NOT A COVERED BENEFIT. THE REQUEST DOES NOT MEET ONE OR MORE OF THE CRITERIA FOUND IN WISCONSIN ADMINISTRATIVE CODE.” DHS cited “DHS 107.03 WISCONSIN ADMINISTRATIVE CODE” as “[t]he specific regulation(s) that support the reason for the denial/modification of your provider’s request for services.” The Parties stipulate that Dkt. No. 21-19 is a true and correct copy of that letter, and refer the Court to that document for a complete representation of its contents.

38. DHS considers the surgical procedures Mr. Flack is seeking (double mastectomy and male chest reconstruction) to be excluded by Wis. Adm. Code § DHS 107.03(24).

39. Mr. Flack administratively appealed DHS’s decision.

40. An administrative law judge denied Mr. Flack’s appeal of DHS’s denial of the preauthorization request on November 21, 2017. The administrative law judge denied Mr. Flack’s request for reconsideration on December 11, 2017.

41. The administrative law judge stated that he based his decision on the Challenged Exclusion. The Parties stipulate that Dkt. No. 21-20 is a true and correct copy of that decision, and refer the Court to that document for a complete representation of its contents.

42. A September 25, 2017 letter from Julie Sager, MD, Medical Director, Bureau of Benefits Management, Division of Medicaid Services, Wisconsin Department of Health Services, submitted to the Division of Hearing and Appeals as part of Mr. Flack's administrative appeal of DHS's denial of prior authorization for the requested surgeries (a true and correct copy of which was filed by Plaintiffs at Dkt. No. 21-22), stated the following:

Mr. Flack is seeking the aforementioned services [a bilateral complete mastectomy (service code 19303) and breast reconstruction (nipple graft-service code 19350)] as part of gender confirmation surgery. The primary diagnosis listed with the prior authorization request is transsexualism (F64.0). Mr. Flack also carries a diagnosis of gender dysphoria which is an accepted medical indication for the surgical treatment requested.

This request was denied by DMS as Wis. Admin. Code DHS 107.03(24) specifically lists 'transsexual surgery' as a non-covered service under medical assistance.

The medical necessity of the services requested was not taken into account as reimbursement by Medicaid for this type of surgery is currently excluded by DHS regulations.

Furthermore, please take notice of the attached federal court decision staying enforcement of Section 1557 of the Affordable Care Act regulations related to gender identity.

43. The Parties stipulate that Dkt. No. 21-22 is a true and correct copy of this letter, and refer the Court to that document for a complete representation of its contents.

Plaintiff Sara Ann Makenzie

44. Ms. Makenzie is enrolled in Wisconsin Medicaid.

45. Ms. Makenzie receives Supplemental Security Income ("SSI").

46. Ms. Makenzie's gender identity is female.

47. Ms. Makenzie has been diagnosed with gender dysphoria.

48. Ms. Makenzie legally changed her name to Sara Ann Makenzie.

49. Ms. Makenzie began seeking medical treatments and therapy for gender dysphoria in approximately 2012.

50. Since 2013, Ms. Makenzie has been on hormone therapy to treat gender dysphoria.

51. In 2014, Ms. Makenzie consulted with her primary care physician, Dr. Trisha Schimek, about obtaining genital reconstruction surgery. Dr. Schimek told Ms. Makenzie that Wisconsin Medicaid would not cover the surgery.

52. Ms. Makenzie's medical providers have recommended that she obtain genital reconstruction in the form of a bilateral orchiectomy and vaginoplasty, which would create female-appearing external genitalia.

53. In February 2018, on the referral of her primary care doctor, Dr. Beth Potter, Ms. Makenzie consulted with Dr. Katherine Gast, a plastic surgeon, about obtaining genital reconstruction surgery.

54. Dr. Gast informed Ms. Makenzie that Wisconsin Medicaid would not cover this procedure.

55. DHS considers the surgical procedures Ms. Makenzie is seeking (bilateral orchiectomy and vaginoplasty) to be excluded by Wis. Adm. Code § DHS 107.03(24).

Dated: July 6, 2018

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