UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CODY FLACK, *et al.*, Plaintiffs, v. WISCONSIN DEPARTMENT OF HEALTH SERVICES, *et al.*, Defendants.	Case No. 3:18-cv-00309-wmc Judge William Conley

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' PROPOSAL FOR PERMANENT EQUITABLE RELIEF

In its August 16, 2019 decision, this Court granted summary judgment to Plaintiffs on all claims and ordered that "defendants are PERMANENTLY ENJOINED from enforcing the Challenged Exclusion (Wis. Admin. Code §§ DHS 107.03(23)-(24), 107.10(4)(p)) against the named plaintiffs and other members of the class." Op. & Order 38 [ECF No. 217] ("Summary Judgment Opinion"). Defendants' proposal for permanent equitable relief effectively asks this Court to vacate the permanent injunction it has already ordered and replace it with a declaratory judgment. The Court should reject Defendants' invitation to relitigate the question of whether Plaintiffs and the Class they represent are entitled to permanent injunctive relief. That question was briefed by the Parties on Plaintiffs' Motion for Summary Judgment and Permanent Injunction [ECF No. 151] ("Summary Judgment Motion") and resolved in Plaintiffs' favor by the Court in the Summary Judgment Opinion. Nothing has happened in the month since then that warrants this Court's reconsideration of that injunction (nor have Defendants properly moved the Court to do so under Rule 59 or Rule 60).

While Plaintiffs have no objection to Defendants' proposed declaratory judgment as a part of the final remedy—and agree that such a declaration should be part of the final judgment

in this case—neither a declaratory judgment or a simple permanent injunction, without more, will suffice to cure the Class-wide Constitutional and statutory violations found by the Court. The fact that Defendants have failed to ensure that Wisconsin Medicaid HMOs cover medically necessary gender-confirming treatments since the entry of the Class-wide preliminary injunction in April is reason enough for this Court to exercise its broad equitable powers to stop the continuing violation of Class Members' rights.

I. The Court Should Reject Defendants' Invitation to Vacate the Permanent Injunction in this Case and Replace it with a Declaratory Judgment.

In its August 16 opinion, the Court did not—as Defendants suggest—ask for more briefing on whether the permanent injunction ordered in that decision was appropriate. Rather, the Court asked the Parties to present joint or separate plans as to the "*scope* of [the permanent injunction] and any other permanent relief." Summ. J. Op. 38 (emphasis added). Defendants' attempt to use their submission to relitigate the motion for a permanent injunction is improper.

Defendants have not moved for reconsideration of the permanent injunction issued by the Court in its August 16 opinion. But even if they had filed such a motion, there is no reason for the Court to reconsider its decision. As this Court has noted, "[r]econsideration [under Rule 59(e)] is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion." *Mlsna v. Union Pac. R.R. Co.*, No. 18-CV-37-WMC, 2019 WL 3983292, at *2 (W.D. Wis. Aug. 23, 2019) (citing *Caisse Nationale de Credit Agricole v. CBI Inds., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996)) (denying motion for reconsideration under Rule 59(e))). "Instead, '[m]otions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.'" *Id.* (quoting *Caisse Nationale*, 90 F.3d at 1269). "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the 'wholesale

disregard, misapplication, or failure to recognize controlling precedent.'" *Id.* (quoting *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (citation omitted)). Accordingly, "Rule 59(e) is not meant to allow the parties 'merely to relitigate old matters,'" *Boyer v. Weyerhaeuser Co.*, No. 12-CV-899-WMC, 2016 WL 2619439, at *2 (W.D. Wis. May 5, 2016), *aff'd sub nom.*, *Pecher v. Owens-Illinois, Inc.*, 859 F.3d 396 (7th Cir. 2017) (citation omitted).

Here, Defendants' only argument in favor of their request to replace the permanent injunction is that "the Seventh Circuit favors declarations over injunctions." Defs.' Br. in Support of Proposal Regarding Equitable Relief 3 [ECF No. 224] ("Defs.' Br."). However, as the Seventh Circuit stated plainly in the case relied upon by Defendants, "[a]s for the choice between declaratory judgment and an injunction: that's a matter left to the district judge's discretion." *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010). Even Defendants concede that a district court has discretion to order permanent injunctive relief. Defs.' Br. 4. While a declaratory judgment may, in some cases, be a fully effective remedy, nothing bars a court from exercising its discretion to order injunctive relief when it deems such relief necessary to cure violations of the Constitution and federal law. None of the cases cited by Defendants suggests otherwise. In any event, Defendants failed to raise this argument in opposing Plaintiffs' Summary Judgment Motion. Since the Court has already granted a permanent injunction, raising these arguments now amounts to little more than an attempt to relitigate a decided issue.

II. An Injunction of the Enforcement of the Challenged Exclusion, Without More, Has Already Proven Insufficient to Protect Class Members' Rights.

Defendants are simply wrong that the permanent injunction of Defendants' enforcement of the Challenged Exclusion, without any further equitable relief, is the "only" appropriate Class-wide injunctive relief in this case. The current permanent injunction, like the earlier preliminary injunctions, has been partially effective in allowing some transgender beneficiaries to obtain

certain previously-excluded treatments, and must remain in effect. However, as detailed in Plaintiffs' brief in support of their proposed remedial plan, one Named Plaintiff, Courtney Sherwin, and a number of other Class Members are facing *continued* denials of coverage for medically necessary gender-confirming surgeries and related services, despite the fact that Defendants have been enjoined from enforcing the Challenged Exclusion for nearly six months. Br. in Support of Pls.' Proposed Remedial Plan 6, 8, 9 [ECF No. 226] ("Plaintiffs' Brief"). So far, these denials have been made by HMOs contracted by Defendant Wisconsin Department of Health Services ("DHS") to administer benefits for the large majority of Wisconsin Medicaid beneficiaries. *Id.* at 5. One of those HMOs, Quartz, will not cover certain medically necessary gender-confirming surgeries without specific written directives from DHS. *Id.* at 8.

As discussed in Plaintiffs' Brief, it is DHS's responsibility as the state Medicaid agency to ensure that its contracted HMOs are complying with the Medicaid Act and federal law. *Id.* at 16-18. By this point, DHS is well-aware that HMOs are denying coverage to Class Members for medically necessary services. Yet, as the evidence submitted by Plaintiffs plainly demonstrates, DHS has failed to take sufficient action to stop the HMOs from unlawfully denying coverage based on their own categorical exclusions, effectively requiring that each beneficiary denied coverage go through the internal HMO grievance process and administrative DHS appeals before *possibly* getting the HMO decision reversed. It is simply not enough that DHS *may* approve prior authorizations for gender-confirming treatments for the minority of beneficiaries on fee-for service plans. The Class includes all beneficiaries seeking treatments for gender dysphoria—whether on fee-for-service or HMO plans—and the Court's decisions have drawn no distinction between them. Nor is it enough, for beneficiaries denied coverage by an HMO, that DHS or an administrative law judge *might* ultimately reverse individual HMO denials. Subjecting

transgender beneficiaries with gender dysphoria to lengthy and unpredictable appeals processes to get care they need *now*—where others seeking the same services for other conditions will have them readily approved—is exposing Class Members to continuing second-class status, delayed or denied health care, and the resulting harms to their health and well-being.

Had DHS taken necessary action in response to the preliminary and permanent injunctions to ensure consistent, lawful coverage determinations by itself and the contracted HMOs, Plaintiffs might have been satisfied with a simple injunction of Defendants' enforcement of the Challenged Exclusion. Unfortunately, it is apparent from the last six months that, without further injunctive relief, DHS will not take adequate voluntary action to bring its contracted HMOs into compliance with this Court's orders and federal law. The specific injunctive relief requested by Plaintiffs is calculated to cure this ongoing violation, as it would require DHS to adopt objective coverage criteria based on prevailing standards of care that can be applied to coverage requests for all Class Members, whether they receive their benefits from DHS directly or through an HMO. Pls.' Br. 13-15. It also includes notice requirements to ensure that Class Members—who may still believe this care is unavailable to them and be deterred from seeking Medicaid coverage—are aware that they can now obtain coverage for gender-confirming treatments when medically necessary for them. *Id.* at 18-20. This straightforward relief is no broader than necessary to vindicate fully the rights of the Class.

Defendants' contention that Plaintiffs previously asked only for a declaratory judgment and permanent injunction barring Defendants' enforcement of the Challenged Exclusion, Defs.' Br. 3, 6-7, is simply untrue. Plaintiffs' class action complaint, originally and as amended, requested a permanent injunction "enjoining any further enforcement or application of the Challenged Exclusion . . . *and* directing Defendants and their agents to provide Medicaid

coverage for all surgical treatments and other medical treatments and services for gender dysphoria (including hormone treatments) without regard to the Challenged Exclusion," as well as "such other and further relief as the Court may deem just and proper." Am. Compl. 41-42 [ECF No. 85] (emphasis added); Second Am. Compl. 42 [ECF No. 210] (same). Moreover, in requesting supplemental briefing on an appropriate remedy, Plaintiffs specifically requested that the Court order "such other equitable relief needed to cure these violations," explaining that

> [s]uch 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.

Summ. J. Mot. 2.[1] This is precisely the type of relief Plaintiffs seek in their proposed remedial order as necessary to effectuate this Court's orders and protect Class Members' rights.

Defendants cite to permanent injunctions issued in two other cases to argue that a permanent injunction barring enforcement of the Challenged Exclusion should suffice. Their reliance on these cases—which, of course, involved different defendants and different factual circumstances—is largely immaterial to the question of whether additional injunctive relief is needed in *this* case. While Defendants are correct that the injunctive relief ordered by this Court in *Boyden v. Conlin* was limited to a permanent injunction against the Group Insurance Board's enforcement of its similar coverage exclusion, there is no indication that the two individual plaintiffs in that case requested further relief. Unlike *Boyden*, this is a class action, and the

[1] Defendants perplexingly argue that "in their summary judgment briefing, Plaintiffs did not point to any evidence that Defendants had not complied with [the preliminary injunctions]." Defs.' Br. 5. The Class-wide preliminary injunction was issued on April 23, 2019, just hours before Plaintiffs filed their summary judgment motion that day. Of course, Plaintiffs had no evidence of Defendants' compliance then. Subsequent history should be the Court's guide here.

permanent relief must be calculated to protect all class members. In any event, the record *here* indicates that some HMOs that administer state employee health plans are still denying coverage for certain gender-confirming procedures to individuals on those plans. *See* Decl. of Emily Smith ¶ 7 [ECF No. 231]. The other case Defendants cite—the Eighth Circuit's nearly 40-year-old decision in *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980)—has even less bearing here. Although that case involved a state Medicaid exclusion, like this one, there is no way to know whether the relief ordered in that case was fully effective,[2] or whether Iowa Medicaid's administrative scheme in 1980 in any way resembled Wisconsin's current system of relying on a network of HMOs to administer the majority of Medicaid benefits in the State.

The specific circumstances here—that DHS currently contracts with HMOs to provide benefits to most beneficiaries, that at least some of those HMOs are refusing to cover medically necessary care without direction from DHS, and that Class Members are facing continued denials of coverage—are the reasons this Court can, and should, exercise its broad equitable powers to order a remedy to end these violations and protect Class Members' rights moving forward.

CONCLUSION

The Court should reject Defendants' invitation to relitigate the question of whether a Class-wide permanent injunction is needed. It is. But this necessary injunction against Defendants' enforcement of the Challenged Exclusion has, by itself, been insufficient to protect Class Members' rights and remedy the effects of the exclusion. Plaintiffs respectfully request the Court to order the additional equitable relief detailed in their proposed plan.

[2] Iowa later reinstated its categorical exclusion on Medicaid coverage for gender-confirming treatments, which has been the subject of recent litigation. *See* Summ. J. Op. 26-27.

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Respectfully submitted,

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