

**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

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO AMEND
SCHEDULING ORDER**

Plaintiffs Cody Flack and Sara Ann Makenzie respectfully oppose Defendants' Motion to Amend Scheduling Order on Plaintiffs' Motion for Preliminary Injunction [Dkt. No. 35] ("Defendants' Motion"). If granted, Defendants' Motion would extend Defendants' time to respond to Plaintiffs' Motion for Preliminary Injunction [Dkt. No. 18] ("Plaintiffs' Motion") by over six weeks from June 14, 2018 to July 31, 2018, and would re-set the injunction hearing scheduled by at least another six weeks from June 27, 2018 to August 15, 2018 or later. This significant delay in resolving Plaintiffs' Motion would prevent Mr. Flack and Ms. Makenzie from obtaining critical, medically-necessary treatments for gender dysphoria and subject them to severe, ongoing, and worsening harms to their health and well-being—the very harms they seek to prevent by moving for preliminary injunctive relief.

For the reasons stated herein, Plaintiffs request that the Court deny Defendants' motion and proceed with the briefing and hearing schedule set by the Court on May 24, 2018.

1. Defendants' requested delays are unreasonable and inconsistent with the purpose of a preliminary injunction: to prevent avoidable irreparable harm.

Defendants' requested extension of time to respond to Plaintiffs' Motion from June 14, 2018 to July 31, 2018, and their requested continuation of the hearing date until on or after August 15, 2018, are unreasonable. Although Defendants characterize this as "a one-month delay in addressing the motion," Defs' Mot. ¶ 16, the requested response deadline is actually 47 days after the current response deadline of June 14, 2018, and 69 days after the date the Preliminary Injunction Motion was filed on May 23, 2018. Likewise, Defendants' requested continuation of the injunction hearing would re-set that hearing to *at least* 49 days after the current hearing date of June 27, 2018 and *at least* 84 days after Plaintiffs' Motion was filed.

Defendants argue that an extension is needed because "[a]t least a year's-worth of litigation . . . is being squeezed into a one month period of time." Defs' Mot. at 3. Of course, the fundamental purpose of a preliminary injunction is to avoid imminent, irreparable harm to the moving party early in a case while litigation on the merits proceeds. The nature of a preliminary injunction—particularly in cases where, as here, the moving parties face irreparable harm to their health and well-being without an injunction—requires courts to act quickly and demands that litigants proceed on an expedited schedule.

Defendants' primary basis for seeking an extension appears to be that the three assistant attorneys general assigned to this case are busy on another case pending in this Court. Indeed, Defendants devote the bulk of their Motion describing upcoming deadlines and anticipated work in *Boyden v. Conlin*, No. 17-cv-264-wmc (W.D. Wis.), an unrelated case involving different plaintiffs, different defendant agencies and officials, and a challenge to a different (albeit similar) state policy excluding transition-related health coverage under Wisconsin's state employee health benefits plan. That policy is enforced by other state agencies and officials; the defendants

in *this* case, Wisconsin Department of Health Services and Secretary Linda Seemeyer, are not parties to *Boyden*. The Attorney General's decision to staff the same attorneys both to this case and *Boyden* should be of no consequence to the Court's consideration of Plaintiffs' motion here.

Moreover, unlike here, no party in *Boyden* is seeking emergency relief requiring urgent attention by this Court. To the contrary, that case has been pending for over a year, discovery has been underway since October, and the original dispositive motion deadline was on May 11, 2018, which was recently extended by this Court to June 8, 2018. *See Boyden* Dkt. Nos. 1, 61, 62. Defendants' Motion offers no cogent reason why their long-known deadlines in that case should take precedence over their obligation to respond to Plaintiffs' motion for emergency relief here. Nor, in light of the expedited schedule set by the Court here do Defendants explain why they are not moving to extend the deadlines in *Boyden* instead.

2. Plaintiffs face substantial risk of harm to their health and well-being if a ruling on their preliminary injunction motion is delayed.

While the existing briefing and hearing schedule might inconvenience Defendants' assigned attorneys, the delays requested in Defendants' Motion would pose significant risks to the health and well-being of Mr. Flack and Ms. Makenzie. As detailed in Plaintiffs' brief in support of their preliminary injunction motion [Dkt. No. 19] ("Plaintiffs' PI Brief"), Mr. Flack and Ms. Makenzie are both low-income Medicaid beneficiaries who lack the financial resources to obtain critical, medically-necessary treatments for gender dysphoria without Medicaid coverage. *See* Pls' PI Br. at 8, 12. A months-long delay in obtaining a decision on their motion would further subject both Mr. Flack and Ms. Makenzie to the ongoing, worsening harm to their health and well-being, as documented in detail in the declarations submitted with their preliminary injunction motion [Dkt. Nos. 22-33]. These injuries include worsening depression and anxiety, a heightened risk of self-harm, and more frequent suicidal ideation. *See* Decl. of

Stephanie L. Budge ¶¶ 44-49, 64-67, 71-73 [Dkt. No. 24]; Decl. of Daniel P. Bergman ¶¶ 11-14 [Dkt. No. 28]; Decl. of Amy M. DeGueme ¶ 13 [Dkt. No. 29]. Further delays on obtaining care are likely to exacerbate these harms. Budge Decl. ¶¶ 72-73; Bergman Decl. ¶ 13.

For these reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion.

Dated: June 1, 2018

Respectfully submitted,

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